Supreme Court, U.S.
FILED

94 431 SEP - 9 1994

NO OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

ALLEN LOTZ
Lieutenant Commander, U.S. Coast Guard
Commandant (G-L-5)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593-0001
(202) 267-0115
Attorney for Petitioner

48 pp

QUESTION PRESENTED

May the *de facto* appointment rationale be relied upon to affirm the acts of civilians improperly appointed to serve as military appellate judges by the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, when those acts include affirming criminal convictions on direct appeal?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	16
APPENDIX A (CMA Decision)	1a
APPENDIX B (CGCMR Decision)	11a
APPENDIX C (CGCMR Decision on reconsideration)	23a
APPENDIX D (Relevant Statutory Provisions)	26a

TABLE OF AUTHORITIES

Cases: Page

Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984) 11, 12, 13

Buckley v. Valeo, 424 U.S. 1 (1976) 7, 10

Dettinger v. United States, 7 M.J. 216 (C.M.A. 1979) 3

Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, No. 93-1151, 129 L. Ed. 2d 832 (1994) 9, 13, 14

Freytag v. Comm'r of Internal Revenue, 111 S. Ct. 2631 (1991) 10, 11

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 12, 14

McDowell v. United States, 159 U.S. 596 (1895) ... 14

Morrison v. Olson, 487 U.S. 654 (1988) 12

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 12, 14

Ryan v. Tinsley, 316 F.2d 430 (10th Cir.), *cert. denied*, 375 U.S. 17 (1963) 11

Solorio v. United States, 483 U.S. 435 (1987) 5

United States v. Carpenter, 37 M.J. 291 (C.M.A.), *cert. pending*, No. 93-676, 62 U.S.L.W. 3411 (1993) ..... *passim*

United States v. Cole, 31 M.J. 270 (C.M.A. 1990) .. 3

United States ex rel. Doss v. Lindsley, 148 F.2d 22 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945) .. 11

United States v. Kovac, 36 M.J. 521 (C.G.C.M.R. 1992) 7

United States v. Maharajh, 28 M.J. 797 (A.F.C.M.R. 1989) 5

United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989) 5

United States v. Prive, 35 M.J. 569 (C.G.C.M.R. 1992), *aff'd*, 39 M.J. 28 (C.M.A.), *cert. pending*, No. 93-966, 62 U.S.L.W. 3429 (1993) 13

Cases – Continued: Page

United States v. Senior, 36 M.J. 1016 (C.G.C.M.R. 1993) 8

United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986) 12

Ex parte Ward, 173 U.S. 452 (1899) 11

Weiss v. United States, 114 S. Ct. 752 (1994) ..... *passim*

Constitutional Provisions:

U.S. Const. Art. II, § 2, Cl. 2 10

Statutes:

Art. 1(1), UCMJ, 10 U.S.C. § 801(1) 4

Art. 6, UCMJ, 10 U.S.C. § 806 4

Art. 18, UCMJ, 10 U.S.C. § 818 5

Art. 26, UCMJ, 10 U.S.C. § 826 4

Art. 66, UCMJ, 10 U.S.C. § 866 ..... 3, 4, 5, 8

Art. 67a, UCMJ, 10 U.S.C. § 867a 2

Art. 142, UCMJ, 10 U.S.C. § 942a 3

28 U.S.C. § 1259(3) 2

28 U.S.C. § 1651(a) 3

49 U.S.C. § 323(a) 8

Other Authorities:

73 Am. Jur. 2d *Statutes* § 257 (1974) 8

82 C.J.S. *Statutes* § 369 (1953) 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

The petitioner, James D. Ryder, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The decision of the United States Court of Military Appeals, *United States v. Ryder,* 39 M.J. 454 (C.M.A. 1994) is reprinted as Appendix A at App. 1a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Ryder,* 34 M.J. 1077 (C.G.C.M.R. 1992), is reprinted as Appendix B at App. 11a. The further decision of the United States Coast Guard Court of Military Review on reconsideration, *United States v. Ryder,* 34 M.J. 1259 (C.G.C.M.R. 1992), is reprinted as Appendix C at App. 23a.

JURISDICTION

The decision of the Court of Military Appeals was issued on 23 June 1994. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3)(Supp. II 1990).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The relevant provision of the Uniform Code of Military Justice, Article 66, 10 U.S.C. § 866, is set forth in Appendix D at App. 26a.

STATEMENT OF THE CASE

Petitioner was a Boatswain's Mate Second Class (pay grade E-5), U.S. Coast Guard, at the time of his court-martial. He was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of various drug-related violations of the Uniform Code of Military Justice (UCMJ). His approved sentence consists of confinement for three years, forfeiture of $699 per month for thirty-six months, reduction

to the lowest enlisted grade (E-1), and a dishonorable discharge. Both the Coast Guard Court of Military Review and the U.S. Court of Military Appeals affirmed his conviction and sentence. App. 11a, 23a, 1a.

The legal background of this issue is critical to a full understanding of this petition. Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five civilian judges appointed by the President with the advice and consent of the Senate for fixed terms of office. Art. 142, UCMJ, 10 U.S.C. § 942 (1988). The appointments of the Court of Military Appeals judges are not at issue here.

Below the Court of Military Appeals are four Courts of Military Review; one each for the Army, Air Force, Navy-Marine Corps, and Coast Guard. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement for one year or more, a dismissal, or a dishonorable or bad-conduct discharge is part of the approved sentence. Art. 66(b), UCMJ, 10 U.S.C. § 866(b) (1988). Courts of Military Review exercise all of the traditional powers of appellate courts, including those under the All Writs Act. 28 U.S.C. § 1651(a); *see Dettinger v. United States,* 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole,* 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court of military review "may affirm only such findings of gulity and the sentence as it finds correct in law and fact . . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (1988). Military appellate judges are selected and assigned to the Court of Military Review by the judge Advocate General of the Service. Art. 66(a), UCMJ, 10 U.S.C. § 886(a). The

Judge Advocate General is the official for each service who is responsible for the overall supervision of military justice matters. *See* Art. 6(a), UCMJ, 10 U.S.C. § 806(a) (1988). In this case, the Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. § 801(1) (1988). The Judge Advocate General is neither the President, the head of a department, or a court of law; accordingly, the appointment to judicial service in the Armed Forces by the Judge Advocate General does not satisfy the Appointments Clause. *See Weiss v. United States,* 114 S. Ct. 752 (1994). However, with respect to military judges who are commissioned officers, the prior appointment by the President and confirmation by the Senate as a military officer does satisfy the Appointments Clause. *Id.*

The Coast Guard Court of Military Review, which reviewed this case, presently consists of five appellate military judges, two of whom are civilians (Chief Judge Baum and Judge Bridgman) and three of whom are Coast Guard commissioned officers. These judges were appointed by the Judge Advocate General. *United States v. Carpenter,* 37 M.J. 291, 294 (C.M.A.), *cert. pending,* No. 93-676, 62 U.S.L.W. 3411 (1993); Art. 66(a), UCMJ, 10 U.S.C. § 866(a) (1988). The Courts of Military Review are typically divided into three-member panels to hear cases; petitioner's case was reviewed by such a three-member panel which included both Chief Judge Baum and Judge Bridgman. App. 12a, 24a.

Courts-martial are presided over by military judges who are military officers. Art. 26, UCMJ, 10 U.S.C. § 826 (1988). A court-martial can try any offense committed by a member of the armed services; the sole requirement for court-martial jurisdiction over the accused is that the accused was on active duty in the military at the time of the

offense. *Solorio v. United States,* 483 U.S. 435 (1987). A general court-martial (the type at which petitioner was tried) may impose sentences that include death, imprisonment for life or a term of years, total forfeiture of pay and allowances, and a dishonorable or bad-conduct discharge (or a dismissal if the accused is an officer). Art. 18, UCMJ, 10 U.S.C. § 818 (1988). A bad-conduct or dishonorable discharge carries a permanent stigma, and it can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Ohrt,* 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh,* 28 M.J. 797 (A.F.C.M.R. 1989) (Lewis, J., concurring).

All military trial judges and most appellate military judges are commissioned officers and lawyers on active duty in their services. In *Weiss,* this Court held that the commissioned officers, having already been appointed by the President as officers, did not need to be separately appointed as judges to be properly appointed under the Appointments Clause. *Weiss,* 114 S. Ct. at 760. However, the Court specifically declined to apply that conclusion to the appointment of civilians to service courts of military review. *Weiss,* 114 S. Ct. at 757 fn. 4. The Court noted that the "constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. See Art. 66(a), UCMJ, 10 U.S.C. § 866(a). It is not at issue here." *Id.*

This case involved trial by a general court-martial presided over by military judges who were commissioned officers. The case was, in due course, reviewed in the Coast Guard Court of Military Review by a panel of judges consisting of one commissioned officer and two civilians. The issue of the appointment of the military trial

and Court of Military review judges to perform judicial duties was raised before the Court of Military Review and the Court of Military Appeals. The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioner's claim that the manner in which the trial and appellate military judges in his case were appointed violated the Appointments Clause of the Constitution. The court's decision addressed that issue in a footnote only, relying on its previous decision in *United States v. Carpenter,* 37 M.J. 291 (C.M.A.), *cert. pending,* No. 93-676, 62 U.S.L.W. 3411 (1993), and this Court's decision in *Weiss v. United States,* 114 S. Ct. 752 (1994) to reject petitioner's contentions. App. 2a.

The Court of Military Appeals' consideration of the issue of the appointment of civilian Court of Military Review judges produced four published opinions by the judges, though all judges voted to affirm that case. *United States v. Carpenter, supra.* Judge Gierke, joined by Judge Cox, authored the opinion of the court. Relying on the Court of Military Appeals decision in *Weiss,*[1] he first concluded that the military judge who tried Carpenter's case and two of the three Coast Guard Court of Military Review judges (the two who were commissioned officers on active duty) who reviewed the case were appointed consistently with the Appointments Clause. *Carpenter,* 37 M.J. at 293. However, with respect to the third member of the Court of Military Review panel in the *Carpenter* case, Chief Judge Baum, who is a civilian, the *Weiss* decision was not controlling.

The Government argued at the Court of Military Appeals in *Carpenter* that Chief Judge Baum's (and, by implication, Judge Bridgman's) appointment to the Court of

---

[1] *Carpenter* was decided by the Court of Military Appeals before this Court's decision in *Weiss.*

Military Review by the Judge Advocate General was a proper appointment because the Judge Advocate General was acting by delegation from the Secretary of Transportation, the head of a department. The court rejected that argument, holding that the appointment power is not delegable. *Carpenter,* 37 M.J. at 294.

The Government next argued that, as a retired military officer, Chief Judge Baum[2] was not a civilian, but remained a commissioned officer whose appointment as such made a separate appointment as a court of military review judge unnecessary in accordance with the *Weiss* decision. The court also rejected that contention. The court noted that Chief Judge Baum was employed and serving in a civilian, not a military, billet, he had not been recalled to active duty, and that judicial duties are not germane to the duties of a retired officer, because a retired officer has no duties. *Carpenter,* 37 M.J. at 295. Judge Bridgman also is employed and serving in a civilian billet, and has not been recalled to active duty to perform his judicial duties.

The court then correctly concluded that Chief Judge Baum's (and, by implication, Judge Bridgman's) appointment to the court of military review was defective. *Carpenter*, 37 M.J. at 295. However, it afforded *de facto* validity to the acts of the Chief Judge, relying on *Buckley v. Valeo,* 424 U.S. 1 (1976), and a January 15, 1993, memorandum of the Secretary of Transportation purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief Judge Baum.[3] *Carpenter,* 37 M.J. at 295 and 294 fn. 1.

---

[2] Judge Bridgman is also a retired military officer. *See United States v. Kovac,* 36 M.J. 521, 525 (C.G.C.M.R. 1992).

[3] On January 15, 1993, the then-Secretary of Transportation, Andrew Card, signed a memorandum purporting to appoint the judges of the Coast Guard Court of Military Review, including Chief

Judge Baum and Judge Bridgman. Because this action occurred well after the decisions of that court in this case, it is not at issue here. In any event, however, the effect of the Secretary's action is in question. The Court of Military Appeals apparently believed that the Secretary's memorandum cured any Appointments Clause problems for the judges named. *Carpenter,* 37 M.J. at 294 fn. 1. However, the court's comment on this matter is not conclusive. That specific issue was not briefed in *Carpenter.* Any comment on the matter was simply *dicta,* because the Secretary's memorandum was signed nearly a year after the Court of Military Review issued its opinion in the case. *See United States v. Carpenter,* 34 M.J. 681 (C.G.C.M.R. 1992). Furthermore, petitioner contends that the memorandum of the Secretary is of no effect. The Secretary of Transportation has no explicit authority under the law to appoint the judges of the Court of Military Review. The Uniform Code of Military Justice authorizes the Judge Advocate General of each service to appoint the judges of the service Court of Military Review, not the Secretary. Art. 66(a), UCMJ, 10 U.S.C. § 866(a); *but see United States v. Senior,* 36 M.J. 1016 (C.G.C.M.R. 1993). The legal provision which generally permits the Secretary to appoint officers of the Department of Transportation should not be applied to support the Secretary's action. *See* 49 U.S.C. § 323(a). It is a well-settled rule of statutory interpretation and application that, where two statutory provisions deal with the same subject, one is general in its application and the other specific, and the two provisions are in conflict, the specific statutory provision is to be applied. 82 C.J.S. *Statutes* § 369 (1953); 73 Am. Jur. 2d *Statutes* § 257 (1974). That is exactly the situation involved here. The two statutes in question are Art. 66(a), UCMJ, 10 U.S.C. § 866(a), and 49 U.S.C. § 323(a). Both statutory provisions concern, at least in part, the appointment of officers of the United States within the Department of Transportation. One provision is general and one specific in terms of appointment of officers. Article 66(a), UCMJ, is specific in that it addresses only the appointment of the judges of the Courts of Military Review; 49 U.S.C. § 323(a) is general in that it addresses the appointment powers of the Secretary generally, Department–wide. The two provisions are in conflict. In Art. 66(a), UCMJ, Congress directed the service Judge Advocate General to appoint the judges of the service Court of Military Review. In 49 U.S.C. § 323(a), Congress authorized the Secretary of Transportation to appoint officers of the Department generally, not specifically naming any particular officers or positions. Therefore, it is clear that the rules of statutory interpretation and ap-

Chief Judge Sullivan concurred based on the *de facto* appointment rationale. *Carpenter,* 37 M.J. at 300. Judge Crawford concurred in the result with respect to the Appointments Clause issue, relying on her separate opinion in *Weiss. Carpenter,* 37 M.J. at 300. Judge Wiss also concurred in the result with respect to the Appointments Clause issue, also relying on the *de facto* appointment rationale. *Carpenter,* 37 M.J. at 300-301.

REASONS FOR GRANTING THE WRIT

This petition raises an issue important to the military justice system. With respect to the question presented, a related issue has been previously raised to and decided by this Court in *Weiss v. United States,* 114 S. Ct. 752 (1994). This Court has also agreed to decide another related issue in *Federal Election Comm'n v. NRA Political Victory Fund,* 6 F.3d 821 (D.C. Cir. 1993), *cert. granted,* No. 93-1151, 129 L. Ed. 2d 832 (1994). This petition, however, presents an issue not directly addressed in this Court's decision in *Weiss*—the appointment by the Judge Advocate General of an Armed Force of civilians to serve as military appellate judges on the service Court of Military Review, and the remedy available to an appellant who raises this issue during the direct appeal of his case. This petition seeks to ensure that the separation of powers requirements and protections embodied in the Appointments Clause are available to those tried by courts-martial whose cases are reviewed by the Courts of Military Review.

---

plication require that the specific provision, Art. 66(a), UCMJ, be given effect over the general provision, 49 U.S.C. § 323(a). Thus, Congress gave the power to appoint the judges of the Coast Guard Court of Military Review to the Judge Advocate General, and not to the Secretary.

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2; *Freytag v. Comm'r of Internal Revenue,* 111 S. Ct. 2631, 2642 (1991). Military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *Weiss v. United States,* 114 S. Ct. 752, 757 (1994).

After this Court's decision in *Weiss,* the only question remaining with respect to the appointment of military judges is the appointment of civilians as appellate military judges on the service Courts of Military Review. After the Court of Military Appeals' decision in *Carpenter,* the only question is whether the *de facto* appointment rationale, coupled with an after-the-fact appointment by the service Secretary, can be relied upon to affirm the acts of civilians appointed to serve as military appellate judges by the Judge Advocate General.

The Court of Military Appeals upheld Carpenter's conviction and sentence, despite the improper appointment of Chief Judge Baum of the Coast Guard Court of Military Review, a civilian, by relying on the *de facto* appointment rationale. *Carpenter,* 37 M.J. at 295. In reaching that result, however, the court devoted only a single sentence to discussing the issue, and cited only one case, *Buckley v. Valeo,* 424 U.S. 1. (1976). However, *Buckley* was an action seeking declaratory and injunctive relief to enjoin the operation of the statutory provisions concerning the Federal Election Commission, not a direct appeal of a criminal conviction, and does not support the action of the lower court.

The *de facto* officer doctrine was developed to limit the circumstances in which government actions can be challenged by attacking the title of the officeholder responsible

for the action. The principal harm that the doctrine was intended to prevent arises when the attack occurs long after the appointment is made, and the defect is of a technical nature that could have and would have been readily cured had it been called to the government's attention in a timely fashion. The *de facto* appointment rationale has been applied to limit the consequences of improper appointments of officeholders, particularly when many innocent third parties would be harmed by their reliance on the acts of the improperly appointed official, as in *Buckley*. The doctrine is clearly not simple. *See Andrade v. Lauer,* 729 F.2d 1475, 1496-1501 (D.C. Cir. 1984). It has apparently never been applied in a case like this. If it is to be extended to these circumstances, it should be done by this Court, with a full discussion of the matter.

Most of the cases in which the *de facto* officer doctrine has been applied are civil cases, not criminal, and the criminal cases have most often involved collateral attacks on state criminal convictions in federal court. *See United States ex rel. Doss v. Lindsley,* 148 F.2d 22 (7th Cir.), *cert. denied,* 325 U.S. 858 (1945); *Ryan v. Tinsley,* 316 F.2d 430 (10th Cir.), *cert. denied,* 375 U.S. 17 (1963); *see also Ex parte Ward,* 173 U.S. 452, 454 (1899) (doctrine used in criminal case to defeat collateral attack on validity of judge's title to office).

The inapplicability of the doctrine to this case can be seen most easily by examining those cases in which it was not applied, but where the doctrine would have provided an easy way to dispose of the case had it been relevant. Thus, in *Freytag v. Comm'r of Internal Revenue,* 111 S. Ct. 2631 (1991), this Court could have avoided deciding the question of whether the Tax Court was a Court of Law or a Department under the Appointments Clause since the special trial judges there were clearly at least *de facto* of-

ficers. Similarly, in *Morrison v. Olson,* 487 U.S. 654 (1988), determination of the constitutionality of the independent counsel would have been unnecessary since the doctrine, had it been applicable, would have sufficed to allow the independent counsel to enforce a grand jury subpoena, which was the specific action challenged there. In *Glidden Co. v. Zdanok,* 370 U.S. 530 (1962), which involved both civil and criminal cases, if the *de facto* officer doctrine were available, the Court would have been able to decide the cases on narrower grounds. *See Id.* at 534. Finally, in *United States v. Woodley,* 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied,* 475 U.S. 1048 (1986), the court of appeals in a direct criminal appeal upheld a recess appointment of a district judge in the face of a claim that the appointment was inconsistent with Article III, yet none of the opinions even mentioned the *de facto* officer doctrine.

It is possible that all of the Justices, judges, and counsel involved in all of these and other cases, such as *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), simply overlooked the *de facto* officer doctrine, but that seems unlikely. However, the failure to rely upon the doctrine in any of those cases is best explained by its inapplicability either to a direct attack on a statutory scheme or, as here, when a judge or prosecutor directly involved in a case has allegedly been appointed in violation of the Constitution.

Two decisions of the District of Columbia Circuit of the U.S. Court of Appeals in which the *de facto* officer doctrine was discussed are instructive. *Andrade v. Lauer,* 729 F.2d 1475 (D.C. Cir. 1984), involved a challenge by current and former federal employees to actions of federal officials (a reduction in force). One of the bases of the challenge was that the officials had not been properly appointed. In response, those officials argued that the *de*

facto officer doctrine precluded any challenge of the actions of the officials on that ground. *Andrade,* 729 F.2d at 1496. The Court of Appeals noted that application of the doctrine in that case would apparently leave the plaintiffs without any remedy. *Id.* at 1497. The court rejected any interpretation of the doctrine "that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." *Id.* at 1498. The court then placed two requirements on litigants challenging government actions on the ground that the officials taking those actions had not been properly appointed: first, the litigant must raise the challenge at or near the time the action is taken; second, the litigant must show that the agency involved had reasonable notice of the alleged defect. *Id.* at 1499.

Applying the analysis of *Andrade* to petitioner's case would seem to preclude reliance on the *de facto* officer doctrine to affirm his conviction. If the doctrine is applied, it leaves him without a remedy for the violation of his right to have his court-martial reviewed by a Court of Military Review composed of military appellate judges who have been properly appointed. He raised the appointment issue while his case was being reviewed by the Court of Military Review. App. 24a. The court was on notice of the alleged defect because it had previously been raised as an issue in another case. App. 25a; *United States v. Prive,* 35 M.J. 569 (C.G.C.M.R. 1992), *aff'd,* 39 M.J. 28 (C.M.A.), *cert. pending,* No. 93-966, 62 U.S.L.W. 3429 (1993).

The other recent case in which the District of Columbia Circuit discussed the *de facto* officer doctrine is *Federal Election Comm'n v. NRA Political Victory Fund,* 6 F.3d 821 (D.C. Cir. 1993), *cert. granted,* No. 93-1151, 129 L. Ed. 2d 832 (1994). There, an issue concerning the constitutionality of the composition of the Federal Election Com-

mission was raised as a defense to the action of the Commission in a civil enforcement action. *Id.* at 822. The Commission argued that the issue was not justiciable because the *de facto* appointment doctrine would prevent the NRA from obtaining a remedy based on that issue in any event. *Id.* at 828. The court rejected an application of the doctrine that would deny the NRA releif. *Id.* The court noted that this Court, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), when it found that the scheme by which bankruptcy judges were appointed was unconstitutional, provided relief to the party who challenged the scheme even though the opinion was to act prospectively only. *FEC v. NRA,* 6 F.3d at 828.

The only federal criminal case found in which the doctrine was relied on to sustain a conviction on direct appeal is *McDowell v. United States,* 159 U.S. 596 (1895). Not only was the doctrine merely an alternative basis for affirming the conviction, but the facts of *McDowell* are very different from this case. The defect alleged in *McDowell* was that proper procedures had not been followed in arranging for an assignment of a duly appointed federal judge from one district to sit in another district. The judge in question had not presided over the defendant's trial, nor was he present when the grand jury had returned the indictment. Rather, the only defect was that he was presiding when the grand jury was first sworn and impaneled, and even then a properly appointed judge may have re-sworn the grand jurors before the indictment was handed down. Under those circumstances, this Court refused to overturn defendant's conviction for what was at worst a highly technical violation of a statute. In addition, the fact that *McDowell* was cited in *Glidden,* 370 U.S. at 535-36, makes it very unlikely that the *de facto* officer doctrine was overlooked in *Glidden*.

It would be particularly harsh to apply the doctrine in a criminal case involving a structural defect of constitutional dimensions, since it is unlikely that anyone could ever challenge the practice before being adversely affected by some act of that officer. Indeed, if the doctrine were relevant in a case like this, it would always be determinative of any question concerning appointment to office, precluding a ruling on the merits of the constitutional claim because to do otherwise would be to render an advisory opinion. In other words, the use of the *de facto* officer doctrine as it was applied by the Court of Military Appeals in *Carpenter, supra,* and in this case, would effectively remove all such claims from judicial review and thereby allow Congress or the Executive to violate the explicit provisions of the Appointments Clause with impunity, because the *de facto* officer doctrine would always prevent a court from setting aside the challenged action.

CONCLUSION

The validity of the appointment of civilians as military appellate judges under the Appointments Clause is a significant constitutional question which this Court should address. As it did in *Weiss,* this Court should grant review to resolve this issue as promptly as possible.

For the reasons stated, petitioner prays that this Court grant review of the question presented in order to bring the military court-martial system into line with the requirements of the Appointments Clause.

Respectfully submitted,

ALLEN LOTZ
Lieutenant Commander, U.S. Coast Guard
Commandant (G-L-5)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593-0001
(202) 267-0115
Attorney for Petitioner

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 68,449/CG
CMR No. 947

UNITED STATES, APPELLEE

v.

JAMES D. RYDER, BOATSWAIN'S MATE SECOND CLASS,
U.S. COAST GUARD, APPELLANT

Argued October 7, 1993
Decided June 23, 1994

---

39 M.J. 454

For Appellant: Lieutenant Commander Allen Lotz (argued).

For Appellee: Lieutenant Garland M. Walker (argued).

Military Judges: Thomas W. Snook, Philip F. Roberts (USN), Douglas A. Smith.

Opinion of the Court

WISS, Judge:

Appellant entered uniform pleas of not guilty to an extensive laundry list of drug-related allegations at his general court-martial comprised of officer and enlisted members. Succeeding in some instances, he nonetheless was convicted of using marijuana (11 specifications), lysergic acid diethylamide (LSD) (3 specifications), and cocaine; distributing LSD; and soliciting Coast Guard personnel to use and to distribute LSD (one specification each), in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934, respectively. The court-martial sentenced him to a dishonorable discharge, confinement for 5 years, forfeiture of $699.00 pay per month for 60 months, and reduction to the lowest enlisted grade.

The convening authority reduced the period of confinement to 3 years and of forfeitures to 36 months but in all other respects approved the trial results. The Court of Military Review set aside the finding of one of the uses of marijuana as not supported by the evidence; the court, however, affirmed the remaining findings and the sentence. 34 M.J. 1077, 1082 (1992).

On appellant's petition, we granted review to consider whether "improperly introduced and admitted evidence resulted in appellant's wrongful conviction."[1] Appellant's complaint of evidentiary error actually involves three distinct aspects of the evidence, none of which was the object of a timely objection at trial. For the reasons dis-

---

[1] Additionally, we granted appellant's petition on two issues which now have been decided against him. *See Weiss v. United States*, ____ U.S. ____, 114 S.Ct. 752 (1994); *United States v. Carpenter*, 37 M.J. 291 (C.M.A.), *cert. pending*, No. 93-676, 62 U.S.L.W. 3411 (1993).

cussed, *infra,* we decide that none of the three was plain error that resulted in "appellant's wrongful conviction." *See United States v. Toro,* 37 M.J. 313 (C.M.A. 1993); *United States v. Fisher,* 21 M.J. 327 (C.M.A. 1988).

I

Without defense objection, Dr. Ray Liu, the Government's expert toxicologist, testified that urine samples taken from appellant on January 4, 23, and 30, and March 3, 1989, each contained the metabolite for marijuana called tetrahydrocannabinol (THC). Trial counsel offered this evidence to corroborate testimony of government witnesses that they had seen appellant smoke marijuana on January 6 and 7 and on February 15, 1989, and testimony of witnesses that appellant had bragged about being able to beat urinalyses.

For the first time on appeal, appellant has urged that Dr. Liu's testimony was inadmissible because, in each instance, the urinalysis reflected a measure of THC below that which Coast Guard regulations treat as "positive" for its presence. He now relies upon our decision in *United States v. Arguello,* 29 M.J. 198 (C.M.A. 1989), as the legal basis of his contention. We hold that admission of this testimony was not plain error so as to overcome appellant's failure to object at trial. See Mil.R.Evid. 103(a)(1) and (d), Manual for Courts-Martial, United States, 1984.

A

Presence of THC in urine is measured in nanograms per milliliter (ng/ml). The laboratory that tested appellant's four urine samples reported detection of THC at the levels of 11.14, 7.58, 5.8, and 7.76 ng/ml, respectively. To put appellant's complaint into perspective, it is necessary here to give some attention to certain Coast Guard regulatory provisions.

Article 20-C-3b(2)(a) of Coast Guard Personnel Manual, Commandant Instruction M1000.6A, Change 1 (21 July 1988), instructs that "urine samples which test positive for" a drug "in a screening test will be" confirmed by "using gas chromatography/mass spectrometry (GC/MS) technology." The provision continues:

> A cutoff level has been established for each drug which will ensure the reliability of any finding that the drug is present in the sample. A laboratory finding by GC/MS that the drug is present at or above the cutoff level will be reported as "confirmed positive" and is evidence of drug abuse.

For the presence of THC, the "cutoff level" that is "evidence of drug abuse" is 50 ng/ml, *see* Art. 20-C-3c(4), while a "confirmed positive" below that level only "is evidence that THC is present in the member's system and requires investigation," *see* Art. 20-C-4c. In fact, 4c then expressly states:

> It [a reading below 50 ng/ml] is not sufficient to establish a drug incident unless there is additional evidence indicating intentional use of drugs, in which case the test result may be used as corroborating evidence to establish a drug incident.

Consistent with this language, Article 20-C-5b reads:

> The absence of a positive urinalysis test result, or a test result below 50 ng/ml for THC, does not preclude taking disciplinary or administrative action based on other evidence.

In sum, these provisions contemplate that a confirmed positive reading of THC at a level of 50 ng/ml or higher will, itself, support a conclusion of drug abuse, while a reading of lower than 50 ng/ml only is evidence of drug presence which does not alone support a conclusion of

drug abuse, but which may be used to corroborate other evidence of intentional drug use. This scheme reflects a sliding-scale of reliability of urinalysis results that is the concern of Article 20-C-3b(2)(a), quoted earlier. *See also United States v. Arguello,* 29 M.J. at 204 (purpose of requiring minimum ng/ml levels to report "positive" result "is to protect the servicemember from adverse action based on unreliable scientific testing").

The Government seeks to distinguish this case from *Arguello* on the basis that the regulation in that case did not have the second prong that the regulation here has. The Government urges that, under the regulation in issue in *Arguello,* the question of "positive" was black or white: If test results were above a prescribed level, the report was "positive"; and if they were below (or nonexistent), it was "negative." The misstep in *Arguello,* the Government points out, was that the prosecution tried to transform a report that was "negative" under the regulation into one that was "positive" by providing expert testimony that the reading nonetheless did reliably show presence of the drug. The Court of Military Review expressed this same rationale in rebuffing appellant's claim of error. 34 M.J. at 1079.

The distinction *may not be* quite so clear, however, in light of yet another Coast Guard regulatory provision, which the Court of Military Review did not expressly consider. Paragraph 6d of Commandant Instruction 5355.1A (24 February 1988) stipulates:

> Samples confirmed positive by GC/MS for THC will be reported in NG/ML, if the level detected is between 20 and 49 NG/ML. THC results at or above 50 NG/ML and all other drugs will be reported as "confirmed positive" only, indicating that the drug concentration level equals or exceeds the GC/MS minimum detection level specified for Coast Guard samples. . . .

A possible inference from this paragraph is that a reading *below 20 ng/ml* is not to be reported "positive" *at all.* In fact, as the court below acknowledged, Dr. Liu himself "testified that the procedure established by laboratory contract with the Coast Guard provides that results of GC/MS testing showing THC metabolites *below 15 nanograms are reported as negative.*" 34 M.J. at 1079 (emphasis added).

B

It is unnecessary here, however, for us to authoritatively interpret the Coast Guard regulations set out earlier and in the process to resolve the different views of the parties. In the absence of timely objection at trial, appellant has waived any appellate complaint unless admission of the evidence was plain error. Mil.R.Evid. 103(a)(1) and (d). We said in *Fisher*: "In order to constitute plain error, the error must not only be obvious and substantial, it must also have 'had an unfair prejudicial impact on the jury's deliberations.' " 21 M.J. at 328. Without deciding whether *Arguello* controls this case, it fairly may be argued that any error here was not obvious and substantial, since the regulations in question are not so clear-cut as was the regulation in *Arguello* and since this trial occurred before our decision in *Arguello.*

In any event, we are fully satisfied that any error did not operate to appellant's substantial prejudice. Art. 59(a), UCMJ., 10 USC § 859(a). Besides the fact that this evidence was only corroborative, rather than primary, appellant forthrightly attacked the reliability of such low readings. Most importantly, however, appellant actually embraced the test results as an offensive weapon to demonstrate that appellant had *not* used *LSD or cocaine* during the relevant period, as the Government had charged. Under similar circumstances in *Toro,* we concluded: "Admission

of the [evidence in question] was clearly part of the defense strategy, and it did not affect a substantial right of appellant." 37 M.J. at 317. We reach the same conclusion here.

II

Dr. Sandra Jo Counts testified as an expert witness for the prosecution concerning the effects of LSD. Appellant asserts for the first time on appeal that her testimony "served both as a polygraph for subsequent government witnesses, and as a vehicle to introduce prior consistent statements of those witnesses." Final Brief at 7. We hold that admission of Dr. Counts' testimony was not plain error. *See United States v. Fisher,* 21 M.J. 327.

In part pertinent to this appeal, Dr. Counts stated that she had interviewed four persons who had described to her their use with appellant on certain occasions of a substance that appellant had furnished. Subsequently in the trial, all four persons testified as government witnesses and gave similar accounts to the court-martial. She opined that, assuming the witnesses were "reliable," the substance that they had taken was LSD. When asked whether she had "any reasonable or significant doubt about that conclusion," she said:

> Well, only that I didn't see it. *So, I am going on the word of what people told me. But if these people are reliable and I had no reason to think that they weren't being at the time, then I would still conclude that it was LSD.*

(Emphasis added.)

This Court repeatedly has denounced use of an expert witness as a human lie detector to vouch for the credibility of another witness or the accused. E.g., United States v. Partyka, 30 M.J. 242 (C.M.A. 1990); *United States v.*

Farrar, 28 M.J. 387 (C.M.A. 1989); *United States v. Arruza,* 26 M.J. 234 (C.M.A. 1988), *cert. denied* 489 U.S. 1011, 103 L.Ed.2d 183, 109 S.Ct. 1120 (1989); *United States v. Petersen,* 24 M.J. 283 (C.M.A. 1987); *United States v. Cameron,* 21 M.J. 59 (C.M.A. 1985). The character of Dr. Counts' statement regarding the credibility of her interviewees is substantially the same as the character of the testimony in issue in *United States v. Partyka, supra* at 246:

> "I assume that when a patient comes to me, that they are telling the truth, and *I assume that unless I have some reason to believe otherwise I have had no reason to believe otherwise."*

(Emphasis added.) This Court condemned this testimony in Partyka, even to the point of holding it to be plain error. *Id.* at 247.

Here, however, the circumstances are different. Dr. Counts' statement arguably was not a continuing voucher for the witnesses' credibility, as was the case in *Partyka*; instead, in substance she might be heard simply to have accepted their reliability at face value for purposes of their interveiw. In this light, any error was not obvious and substantial.

Further, each of these witnesses later testified for themselves and thereby offered the members their own opportunity to judge the witnesses' credibility. We believe that, based on the full record, Dr. Counts' testimony did not have an unfair prejudicial impact on the members' deliberations either by vouching for the witnesses' credibility or by improperly bolstering their credibility with hearsay statements, *see* Mil.R.Evid. 801(d)(1)(B); *see also United States v. Neeley,* 25 M.J. 105, 106-08 (C.M.A. 1987) (regarding danger of "smuggling hearsay" evidence via expert testimony and danger of prejudice inconsequential when

declarant later testifies to same effect), *cert. denied,* 484 U.S. 1011, 98 L.Ed. 2d 660, 108 S.Ct. 710 (1988). Thus, appellant's failure to enter trial objections effectively waived any error. *See United States v. Fisher,* 21 M.J. 327.

III

While offering evidence on the twenty nine drug-related offenses charged against appellant, the prosecution's witnesses also revealed evidence of several drug-related incidents with which appellant was not charged. They involved other instances of alleged use of marijuana and other drugs, efforts to avoid detection through urinalysis by use of other chemicals in his system, ignoring drug use by other servicemembers, and attempting to persuade witnesses not to testify against him at the instant court-martial.

In this Court, appellant complains that the sole purpose of this evidence was improperly to paint his character in such a way as to lead the members to believe that he acted in conformity with that character on the occasions charged. Mil.R.Evid. 404(b). Appellant raised no similar objection at trial, however, so again his appellate cries of foul have been waived absent a finding of plain error. Mil.R.Evid. 103(a)(1) and (d). We find none. *See United States v. Fisher, supra.*

Applying the three-part test articulated in *United States v. Reynolds,* 29 M.J. 105, 109 (C.M.A. 1989), and reiterated in *United States v. Cousins,* 35 M.J. 70, 74 (C.M.A. 1992), there would not seem to be any error at all, much less error that was obvious and substantial. The evidence of uncharged misconduct all fairly may be viewed as part of the *res gestae* of the charged offenses—closely linked to the charged offenses in time, place, and circumstance—and admissible to help explain and clarify the

pattern of appellant's drug abuse and efforts to avoid detection that was reflected in the charged offenses. *See United States v. Metz,* 34 M.J. 349, 351 (C.M.A. 1992). Further, considering the extensive and varied pattern of drug-related charges facing appellant, it is difficult to imagine how evidence of a relatively small number of similar uncharged incidents could have offered a danger of unfair prejudice that would substantially outweigh the probative value of the evidence. *See* Mil.R.Evid. 403.

Additionally, there is no chance at all, in our view, that the challenged evidence had an unfair prejudicial impact on the members' deliberations. The evidence of appellant's guilt was abundant. Moreover, the members themselves capably demonstrated an ability to focus the evidence with laser-like precision on the offenses charged by acquitting appellant on nearly one-third of those offenses.

IV

The decision of the United States Coast Guard Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

U.S. COAST GUARD COURT OF MILITARY REVIEW

CGCM 0034
Docket No. 947

UNITED STATES

v.

JAMES D. RYDER, BOATSWAIN'S MATE SECOND CLASS,
U.S. COAST GUARD

April 27, 1992

---

34 M.J. 1077

Military Judge: (12 June 1989) CAPT Thomas W. Snook, USCG

Military Judge: (19 July 1989) CAPT Philip F. Roberts, JAGC, USN

Military Judge: (21-25 August 1989) CAPT Douglas A. Smith, USCG

Trial Counsel: LCDR Lawrence I. Kiern, USCG

Civilian Defense Counsel: Kevin Hogan, Esquire, (21-25 August 1989)

Detailed Defense Counsel: LT Michael Forney, JAGC, USNR, (12 June, 19 July and 21-25 August 1989)

Appellate Defense Counsel: LCDR G. Arthur Robbins, USCG

Appellate Government Counsel: LCDR Michael J. Devine, USCG

BEFORE PANEL ONE, BAUM, BRIDGMAN, and SHKOR, Appellate Military Judges.

BAUM, Chief Judge:

At a trial held on 12 June, 19 July and 21-25 August 1989, Appellant pled not guilty to numerous offenses before a general court-martial composed of officers and enlisted members. Despite his pleas, the court convicted Appellant of one specification of distribution of lysergic acid diethylamide (LSD) and fifteen specifications of wrongful use of controlled substances, which included marijuana, LSD and cocaine, in violation of Article 112(a), Uniform Code of Military Justice (UCMJ); and two specifications of solicitation of Coast Guard members to use or distribute drugs in violation of Article 134, UCMJ. He was sentenced to reduction to E-1, forfeiture of $699 per month for 60 months, confinement for 5 years and a dishonorable discharge. The convening authority approved the reduction and discharge as adjudged but mitigated the forfeitures to $699 per month for 36 months and the confinement to 3 years. Before this Court, Appellant briefed and orally argued the following two assignments of error:

I

IMPROPERLY INTRODUCED AND ADMITTED EVIDENCE RESULTED IN APPELLANT'S WRONGFUL CONVICTION

II

APPELLANT WAS DENIED DUE PROCESS OF LAW AND RECEIVED A DISPROPORTIONATE SENTENCE DUE TO THE MILITARY JUDGE UNDULY EMPHASIZING THE DETERRENT FUNCTION OF SENTENCING WHEN HE RESPONDED TO AN INQUIRY FROM THE MEMBERS DURING SENTENCING DELIBERATIONS

During oral argument, a motion to assign the following supplemental error was granted from the bench and briefs from appellate defense and Government were submitted:

III

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION AND ARTICLE 27, UCMJ, 10 U.S.C. § 827.

Assignment of Error I

IMPROPERLY INTRODUCED AND ADMITTED EVIDENCE RESULTED IN APPELLANT'S WRONGFUL CONVICTION

In Assignment of Error I, Appellant contends that he was convicted as a direct result of the admission of three clusters of inadmissible evidence: (1) urinalysis test results showing tetrahydrocannabinol (THC) metabolite at levels below the Coast Guard cutoff for reporting samples as positive, accompanied by inadmissible testimony from an expert witness, (2) testimony by a second expert concerning the reliability of government witnesses who reported the use of lysergic acid diethylamide (LSD), including improper introduction of prior consistent statements by those witnesses, and (3) evidence of uncharged misconduct.

Urinalysis Test Results

The facts with respect to the urinalysis test results are that four separate urine samples, stipulated to have been provided by Appellant, were admitted in evidence without objection, along with the laboratory reports of gas chromatography/mass spectrometry (GC/MS) testing done on each sample, also admitted without objection by the defense. The director of the laboratory, Dr. Ray Liu, was qualified as an expert witness and testified that the reports showed that GC/MS testing had been conducted on all the samples and reflected THC metabolites in each of the samples at the following levels: 11.14 nanograms per milliliter, 7.58 nanograms per milliliter, 5.8 nanograms per milliliter and 7.76 nanograms per milliliter. He further testified that the procedure established by laboratory contract with the Coast Guard provides that results of GC/MS testing showing THC metabolites below 15 nanograms are reported as negative. Dr. Liu, when asked to correlate the various test results with possible marijuana ingestion on dates testified to by various witnesses, expressed the opinion that, because of the elapsed time between the observed ingestion and the testing, the nanograms of THC metabolite shown by GC/MS analysis indicated either one-time ingestion of a large quantity of marijuana or chronic use of smaller amounts. No objections were interposed to any of this testimony.

Appellant, citing *U.S. v. Arguello,* 29 M.J. 198 (C.M.A. 1989) and *U.S. v. Gray,* 30 M.J. 231 (C.M.A. 1990), now asserts that admission of the test results and Dr. Liu's testimony was plain error. The Government, in response, submits that admission of the urinalysis findings as well as Dr. Liu's testimony was not plain error and that any issue in this regard should be deemed waived by Appellant's failure to object at trial. The Government notes

that the instant trial was held before the decisions in *U.S. v. Arguello, supra,* and *U.S. v. Joyner,* 29 M.J. 209 (C.M.A. 1989), cases involving urinalysis test results below departmental cutoff levels. The Government says, however, that even considering those cases as persuasive authority on the subject, the facts here distinguish the instant case from *Arguello* and align it more closely with *Joyner,* which upheld the admission of urinalysis evidence below a level set by the Department of Defense.

While we are not convinced as to this case's similarity with *Joyner*, as seen by the Government, we do distinguish the instant facts from *U.S. v. Arguello, supra,* as well as from *U.S. v. Gray, supra,* the other decision cited by Appellant. Both of those cases were governed by Department of Defense regulations which bar disclosure or use of test results below the established level for a positive result. The Coast Guard, which is not a part of the Department of Defense, has regulations which do not expressly prevent use of test results below a certain point as corroborating evidence in a court-martial.

The Government notes that the Coast Guard regulations do provide that only urinalysis tests showing nanograms above a certain magnitude may be used as the *sole* basis for administrative or disciplinary action. Here, while the results were below that specified level, they were used only to *corroborate* the testimony of witnesses who observed the accused smoking marijuana on specific dates. Accordingly, we find that use of this evidence did not contravene the express terms of Coast Guard Regulations and did not constitute plain error. The fact that the nanograms per milliliters in each instance were below that called for in Coast Guard regulations for use as the only evidence of marijuana ingestion goes only to the weight of the evidence as corroboration, not to its admissibility. Plain error was not committed and the waiver rule applies. Appellant's assignment in this regard is rejected.

Expert Testimony Concerning LSD

Appellant asserts that the testimony of a second expert witness, Dr. Sandra Jo Counts, concerning the effects of LSD served to vouch for the truthfulness of subsequent government witnesses who testified to use of LSD by Appellant, and, thus, impermissibly invaded the province of the factfinder. Appellant also contends that this expert's testimony was improperly used as a means for introducing prior consistent statements of the government witnesses. Appellant failed to object to this testimony at trial, and the Government asserts waiver.

Appellant's failure to object constituted waiver. Aside from waiver, however, we consider the expert's testimony to be proper in all respects. While the opinions expressed by the expert rested on facts related to her by government witnesses, that is fairly routine with respect to expert opinion. It does not mean that the expert is vouching for the truth of the facts, simply that the expert opinion concerning LSD flowed from the asserted facts. It was left to the court to determine whether the underlying testimony was true or not. In our view, the expert was simply saying that the facts related by the witnesses, if deemed to be true, are consistent with LSD use. Appellant's assigned errors with respect to this testimony are rejected.

Testimony of Uncharged Misconduct

As a separate matter, Appellant assigns as error that numerous instances of uncharged misconduct were related to the court by government witnesses. As before, the complained of testimony was not objected to at trial and again, we deem the issue waived. Accordingly, Appellant's Assignment of Error I is rejected in its entirety.

Assignment of Error II

APPELLANT WAS DENIED DUE PROCESS OF LAW AND RECEIVED A DISPROPORTIONATE SENTENCE DUE TO THE MILITARY JUDGE UNDULY EMPHASIZING THE DETERRENT FUNCTION OF SENTENCING WHEN HE RESPONDED TO AN INQUIRY FROM THE MEMBERS DURING SENTENCING DELIBERATIONS

In his second assignment of error, Appellant contends that he was denied due process of law and received a disproportionate sentence as a result of the military judge's response to an inquiry from the court members. Appellant says that the judge's statement unduly emphasized the deterrent function of sentencing. The facts relating to this assignment are that midway through sentence deliberations, the members submitted a question to the judge asking whether the court could make a written statement in conjunction with its sentence. That statement, after characterizing the accused's offenses, said:

> We fervently hope that enough of the details of this and other similar cases can be extracted from the record and published so it can be available to commanding officers to use as training material. If so, perhaps the message to our people can get through that:
>
> 1) If you do things like this, in the long term you will not get away with it.
>
> 2) When you get caught, it will be a painful experience not only for you, but for others around you, including your family.
>
> 3) It can happen anywhere if the people in responsible positions don't keep their eyes and ears open and do their job.

Record of Trial Appellate Exhibit XXXIX.

Upon reading that proposed statement, the judge said to the members in open court:

> Gentlemen, having closely examined Appellate Exhibit 39, I can understand your concerns and feelings that's [sic] expressed in this. However, under the circumstances, I believe it would be inappropriate to make that sort of pronouncement in the Court when you announce the sentence. I believe the content of the sentence that you announce will, by its content, convey the message that is contained in this exhibit.

Record at 1295.

The defense made no objection to this instruction, nor did it request a session out of the presence of the members to read the statement and state its position to the judge. Here, for the first time, Appellant objects to the judge's remarks and claims they led directly to a disproportionate sentence by emphasizing the deterrent function of sentencing.

Appellant contends that the plain inference to be drawn from the judge's words accompanying his ruling not to allow the court's statement was that the court should impose a severe enough sentence to communicate its message. The Government, in response, says that interpretation stretches the judge's instruction beyond its natural meaning. In the Government's view, the judge was simply telling the members that he would not allow the court to read a possibly confusing statement into the record in conjunction with the sentence. In any event, according to the Government, "[t]he defense may not sit idle if they do not concur with the procedure adopted by the Military Judge. If defense counsel deems instructions to be unclear or imprecise, there is an obligation for counsel to object or seek clarification." Government's Brief at 15. The Government submits that, assuming arguendo that

somehow the judge's explanation was in error, it did not amount to plain error and the defense's failure to object waives the issue. We agree.

Moreover, we also agree with the Government's assertion that the number and nature of the offenses, in combination with the surrounding circumstances, warranted the adjudged sentence. The accused, a second class petty officer, used drugs over a substantial period of time and was also convicted of distributing LSD. Furthermore, he was senior member of his duty section and used drugs while underway in a Coast Guard boat. The maximum punishment authorized for his offenses included 68 years confinement. We agree with the Government that the sentence imposed, which includes only five years confinement, simply cannot be characterized as disproportionate. Appellant's second assignment of error is rejected.

Assignment of Error III

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE CONSTITUTION AND ARTICLE 27, UCMJ, 10 U.S.C. § 827.

In his last assignment of error, Appellant argues that he was denied effective assistance of counsel in violation of the Sixth Amendment to the Constitution and Article 27, UCMJ. In support of this contention, Appellant points to counsel's failure to object to the evidence described in Assignment of Error I as inadmissible. He also cites the defense's failure to examine the court members' proposed sentencing statement and the failure to object to the judge's instruction in that regard. Additionally, Appellant says that counsel failed to conduct any prior independent investigation of the urinalysis values and failed to cross-examine the expert witness, Dr. Liu, on the matter of the

urinalysis results being less than the amounts accepted as standard test deviation, or on the possibility of innocent ingestion producing such results. Appellant also faults counsel for not calling a defense expert to explain the ambiguity of the Government's evidence. Moreover, Appellant sees the failure to submit any post-trial assignments of error to the convening authority as further indication of ineffective representation. In Appellant's view these asserted failures, taken as a whole, fall well outside the range of professionally competent assistance, and constitute ineffective representation.

Similar assertions pertaining to another counsel were addressed by this Court in the companion case of *U.S. v. Puckett,* 32 M.J. 783 (C.G.C.M.R. 1991). As we stated in that case, the standard for reviewing such claims of ineffective representation is set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). That standard bears repeating here:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668 at 687, 104 S.Ct. 2052 at 2064.

The counsel errors asserted by Appellant do not meet the test of *Strickland v. Washington, supra.* In an affidavit from Appellant's civilian attorney, filed with the Court by the Government, defense counsel explains his actions as part of overall strategy that had a reasonable basis

at the time. Appellant was maintaining his innocence in the face of numerous expected witnesses who would testify to the contrary. The accused planned to take the stand in his own defense, and he did just that, denying his guilt under oath. Technical objections to evidence that might have been sustained, if raised when first offered by the Government, would later prove fruitless upon that same evidence being presented as rebuttal to the accused's own testimony. In light of this conclusion, defense strategy was to forego such objections and concentrate, instead, on obtaining favorable testimony from prosecution witnesses on cross-examination. In line with this tactic, a decision was made not to attempt to discredit the government witnesses whose testimony on cross-examination might prove helpful.

We find counsel's trial and pretrial actions with respect to the charges against the accused were consistent with this strategy and not to be characterized as deficient. His actions at the sentencing stage of trial are also deemed to be reasonable. Those actions, as explained by counsel, are not considered to be errors on his part. Finally, the defense attorney's decision after trial not to submit assignments of error to the convening authority was consistent with his client's post-trial acknowledgment of guilt and desire to cooperate with the Government in an effort by the accused to obtain clemency. Counsel successfully pursued the clemency tack instead of asserting legal errors and ultimately obtained a reduction in the sentence from five years forfeitures and confinement to three years for both.

For the foregoing reasons, Appellant's third assignment of error is deemed to be without merit.

Appellant has noted that the finding of guilty of Specification 1 of Additional Charge I, which alleges that he used marijuana in or near Neah Bay on or about 30 November 1988, is not supported by the evidence. We

agree. Accordingly, the finding of guilty of Specification 1 of Additional Charge I is set aside and the Specification is dismissed. The remaining findings of guilty are deemed to be correct in law and fact.

We have reassessed the sentence in light of the finding of guilty that was set aside. Upon reassessment, we find the sentence legally correct and appropriate for the remaining offenses. We are convinced on the basis of the entire record that the remaining findings of guilty and sentence should be approved. Accordingly, the remaining findings of guilty and the sentence, as approved below, are affirmed.

Judges BRIDGMAN and SHKOR concur.

APPENDIX C

U.S. COAST GUARD
COURT OF MILITARY REVIEW

CGCM 0034
Docket No. 947

UNITED STATES

v.

JAMES D. RYDER, BOATSWAIN'S MATE SECOND CLASS,
U.S. COAST GUARD

July 6, 1992

---

34 M.J. 1259

Trial Counsel: LCDR Lawrence I. Kiern, USCG

Assistant Trial Counsel: LT Brian Schroeder, USCG

Civilian Defense Counsel: Kevin Hogan, Esquire, (21-25 August 1989)

Detailed Defense Counsel: LT Michael Forney, JAGC, USNR, (12 June, 19 July and 21-25 August 1989)

Appellate Defense Counsel: LCDR G. Arthur Robbins, USCG

Appellate Government Counsel: LT Garland M. Walker, USCGR

BEFORE PANEL ONE, BAUM, BRIDGMAN, SHKOR and EDWARDS,[1] Appellate Military Judges.

PER CURIAM:

On 8 May, 1992, this Court ordered reconsideration of our decision of 27 April 1992, 34 M.J. 1077, in response to a motion by the Appellant. Subsequently, on 26 May 1992, Appellant filed the following assignments of error to be considered in addition to the three previously filed and adversely resolved by our earlier decision:

IV

APPELLANT'S CONVICTION MUST BE SET ASIDE BECAUSE DUE PROCESS REQUIRES THAT A JUDGE IN A CRIMINAL CASE HAVE A FIXED TERM OF OFFICE. *BUT SEE UNITED STATES V. GRAF,* 32 M.J. 809 (N.M.C.M.R. 1990), *PETITION GRANTED,* 33 M.J. 189 (C.M.A. 1991) (MEM.).

V

APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

VI

THE COURT OF MILITARY REVIEW IS WITHOUT POWER TO AFFIRM THE FINDINGS OF GUILTY AND SENTENCE BECAUSE THE APPELLATE MILITARY JUDGES ARE ASSIGNED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION.

---

[1] Judge Edwards did not participate in this decision.

Upon reconsideration of our prior decision, we adhere to the determination therein with respect to Assignments of Error I, II and III. With respect to the newly asserted errors, Assignments V and VI were briefed and orally argued before Panel Five of this Court in the case of *U.S. v. Prive,* 35 M.J. 569 (C.G.C.M.R. 1992). That panel's decision is deemed dispositive of those issues and we follow the holding in that case.

Assignment of Error IV was summarily assigned as an error in *U.S. v. Prive, supra.* It has been briefed in the instant case and, among other things, Appellant argues that the United States Navy-Marine Corps Court of Military Review decided this issue wrongly in *U.S. v. Graf,* 32 M.J. 809 (N.M.C.M.R. 1990), *Petition Granted,* 33 M.J. 189 (C.M.A. 1991) (MEM.). He contends that we should reject that Court's analysis in *U.S. v. Graf, supra,* and, instead, find that due process requires a fixed term of office for general court-martial and appellate military judges. To the contrary, we must reject Appellant's assignment because we find *U.S. v. Graf, supra,* to be correctly decided.

In light of the foregoing, upon reconsideration, our decision of 27 April 1992 setting aside the finding of guilty of Specification 1 of Additional Charge I, affirming the remaining findings of guilty, and affirming the sentence is reaffirmed.

Chief Judge BAUM and Judges BRIDGMAN and SHKOR CONCUR.

APPENDIX D

RELEVANT PROVISIONS OF THE UNIFORM CODE OF MILITARY JUSTICE

10 U.S.C. § 866. Art. 66. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

* * *

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and

determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1994—301-858/88002

(2)

FILED
NOV 14 1994
OFFICE OF THE CLERK

No. 94-431

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

CHARLES J. BENNARDINI
Lieutenant Commander, USCG
Appellate Government Counsel
Commandant (G-LMJ)
United States Coast Guard
Washington, D.C. 20593-0001

13 pp

QUESTION PRESENTED

Whether actions taken pursuant to statutory authority by the United States Coast Guard Court of Military Review should be accorded de facto validity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Ball v. *United States*, 140 U.S. 118 (1891)	6
Buckley v. *Valeo*, 424 U.S. 1 (1976)	5-6, 7
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988)	8
EEOC v. *Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981)	6
McDowell v. *United States*, 159 U.S. 596 (1895)	6
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)	7
Norton v. *Shelby County*, 118 U.S. 425 (1886)	6, 7
Ryan v. *Tinsley*, 316 F.2d 430 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963)	7
United States v. *Carpenter*, 37 M.J. 291 (C.M.A. 1993), petition for cert. pending, No. 93-676 (filed Oct. 29, 1993)	2, 3, 4, 5
United States v. *Kovac*, 36 M.J. 521 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993)	2
United States v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 28 (C.M.A. 1993)	4
United States ex rel. Doss v. *Lindsley*, 148 F.2d 22 (7th Cir.), cert. denied, 325 U.S. 858 (1945)	6, 7
Waite v. *Santa Cruz*, 184 U.S. 302 (1902)	6
Weiss v. *United States*, 114 S. Ct. 752 (1994)	2

Constitution and statutes:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause) 2, 4, 8
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 66(a), 10 U.S.C. 866(a) 2
Art. 112a, 10 U.S.C. 912a 3
Art. 134, 10 U.S.C. 934 3
49 U.S.C. 323(a) 3, 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-431

JAMES D. RYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-10a) is reported at 39 M.J. 454. The initial opinion of the United States Coast Guard Court of Military Review (Pet. App. 11a-22a) is reported at 34 M.J. 1077. The opinion of the Coast Guard Court of Military Review upon reconsideration (Pet. App. 23a-25a) is reported at 34 M.J. 1259.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 9, 1994. The juris-

diction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

1. The Coast Guard Court of Military Review is composed of five appellate judges, three of whom are active duty commissioned officers in the pay grade of O-6. See *United States* v. *Carpenter*, 37 M.J. 291, 293-295, 300 (C.M.A. 1993), petition for cert. pending, No. 93-676 (filed Oct. 29, 1993). The other two members of the court are civilians. Those two judges—Chief Judge Joseph H. Baum and Associate Judge Alfred F. Bridgman, Jr.—are retired commissioned officers who attained the pay grade of O-6 prior to retirement. *Ibid.*; *United States* v. *Kovac*, 36 M.J. 521, 525 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993).

Before January 15, 1993, members of the Coast Guard Court of Military Review were appointed by the General Counsel of the Department of Transportation, who is also the Judge Advocate General for the United States Coast Guard. *Carpenter*, 37 M.J. at 294.[1] On that date

---

[1] The Judge Advocate General's authority to "establish a Court of Military Review" rests upon Article 66(a) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 866(a). In *Weiss* v. *United States*, 114 S. Ct. 752 (1994), this Court held that "those serving as military judges must be appointed pursuant to the Appointments Clause." *Id.* at 757. With respect to commissioned officers serving as military judges, the Court held, the initial appointment as a commissioned officer is constitutionally sufficient; no further appointment pursuant to the Appointments Clause is a prerequisite to an officer's assignment to a military court. *Id.* at 758-760. The Court noted that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a quite different question. It is not at issue here." *Id.* at 757 n.4 (citation omitted).

the Secretary of Transportation issued a memorandum stating that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." *Id.* at 300; see also *id.* at 294 n.1.[2]

2. Petitioner, a member of the United States Coast Guard, was convicted on 11 specifications of marijuana use, three specifications of use of lysergic acid diethylamide (LSD), one specification of cocaine use, one specification of distributing LSD, one specification of soliciting Coast Guard personnel to use LSD, and one specification of soliciting Coast Guard personnel to distribute LSD, in violation of Articles 112a and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a and 934. He was sentenced to five years' confinement, forfeiture of $699.00 per month for 60 months, reduction to the lowest enlisted pay grade (E-1), and a dishonorable discharge from the Coast Guard. Pet. App. 2a. The convening authority reduced the period of confinement to three years and the period of forfeitures to 36 months, but approved the sentence in all other respects. *Ibid.*

Petitioner appealed to the Coast Guard Court of Military Review, contending that (1) his convictions had resulted from the improper admission of evidence, (2) his sentence was disproportionately harsh, and (3) he had been denied effective assistance of counsel. See Pet. App. 12a-13a. When petitioner's appeal was heard, the members of the court were serving pursuant to

---

[2] Under 49 U.S.C. 323(a), "[t]he Secretary of Transportation may appoint and fix the pay of officers and employees of the Department of Transportation and may prescribe their duties and powers."

appointments by the General Counsel. The court affirmed petitioner's convictions and sentence. See *id.* at 11a-22a. In response to petitioner's motion, the court ordered reconsideration of its decision. See *id.* at 24a. On reconsideration, petitioner argued, *inter alia*, that the method of assigning the members of the Court of Military Review violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. The court rejected that contention on the authority of *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 28 (C.M.A. 1993). Pet. App. 25a.

3. Approximately one year later, the Court of Military Appeals held in *Carpenter* that the method by which the Chief Judge of the Coast Guard Court of Military Review had been selected before January 15, 1993, violated the Appointments Clause. See 37 M.J. at 294-295. The court concluded, however, that the constitutional flaw in the appointment process did not require reversal of Carpenter's conviction and sentence. It explained:

> Just as the acts of the federal election commissioners were accorded *de facto* validity in *Buckley v. Valeo*, 424 U.S. [1,] 142 [(1976) (per curiam)], we hold that the judicial acts of the Chief Judge are entitled to *de facto* validity. Accordingly, we hold that the decision of the Court of Military Review in this case is valid, notwithstanding the defective appointment of the Chief Judge.

Id. at 295.

In this case, petitioner argued in the Court of Military Appeals that his convictions and sentence should be overturned on the ground that the civilian members of the Court of Military Review had been unconstitutionally appointed. Relying on *Carpenter*, the Court

of Military Appeals rejected that contention. See Pet. App. 2a n.1. The Court of Military Appeals also rejected petitioner's contention that his convictions had been based on improperly admitted evidence. See *id.* at 1a-10a.

DISCUSSION

1. Petitioner challenges the Court of Military Appeals' determination to accord de facto validity to the actions of the Coast Guard Court of Military Review in this case. Pet. 9-15. On October 11, 1994, this Court heard argument in *Federal Election Commission* v. *NRA Political Victory Fund*, No. 93-1151. The second question presented in that case is whether actions previously taken by the Federal Election Commission should be accorded de facto validity if the Court determines that the composition of the Commission, which includes the Secretary of the Senate and the Clerk of the House of Representatives as ex officio, non-voting members, violates constitutional separation-of-powers principles. Because the Court's resolution of that issue could affect the analysis in this case, the petition in this case should be held pending this Court's decision in *NRA Political Victory Fund*, and disposed of as appropriate in light of that decision.[3]

2. If this Court decides *NRA Political Victory Fund* without addressing the second question presented in that case, the petition in the instant case should be denied.

a. The Court of Military Appeals in *Carpenter* relied upon this Court's decision in *Buckley* v. *Valeo*, 424 U.S.

---

[3] We note that two other petitions for certiorari raising the same issue as is presented in the instant case are currently pending before the Court. See *Carpenter* v. *United States*, No. 93-676 (filed Oct. 29, 1993); *Clark* v. *United States*, No. 93-966 (filed Dec. 20, 1993).

1, 142 (1976) (per curiam), which held that the prior acts of the Federal Election Commission should be accorded de facto validity despite the constitutional flaw in the manner of the Commissioners' appointment. See 37 M.J. at 295. The decision in *Buckley* was in keeping with this Court's longstanding application of the "de facto officer" doctrine. See, *e.g.*, *Norton* v. *Shelby County*, 118 U.S. 425, 441-449 (1886); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Waite* v. *Santa Cruz*, 184 U.S. 302, 323 (1902). Under that doctrine, "[a] person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945). The de facto officer doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441. Accord *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles.").

In one significant respect this Court's de facto officer doctrine cases are distinguishable from more recent decisions such as *Buckley*. Where the de facto officer doctrine has been applied, the Court has typically declined to address the legal validity of the officer's appointment or election, on the theory that the purported unlawfulness of the officer's selection furnished no basis for a "collateral attack" on his acts in office. *Ball*, 140 U.S. at 129; see also *McDowell*, 159 U.S. at 601-602;

Lindsley, 148 F.2d at 23; *Ryan* v. *Tinsley*, 316 F.2d 430, 432 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963). In more recent decisions, by contrast, the Court has addressed and decided issues concerning the legality of the challenged officers' appointment or exercise of power, but has determined that its decision should be given prospective effect only. See, *e.g.*, *Buckley* v. *Valeo*, *supra*; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring in the judgment). In *Northern Pipeline*, for example, the plurality explained that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." *Id.* at 88; see also *id.* at 92 (Rehnquist, J., concurring in the judgment).

The Court of Military Appeals' decision not to overturn petitioner's convictions is consistent with the rationale of those cases. In this case, as in those, both "policy and necessity," *Norton*, 118 U.S. at 441, support the Court of Military Appeals' decision to accord de facto validity to the prior rulings of the Coast Guard Court of Military Review. Petitioner does not maintain that the method of appointing judges to the Court of Military Review before the Secretarial appointment of January 15, 1993, had an actual adverse effect on the outcome of his case. And unlike the commissioners in *Norton*, the judges in petitioner's case were not "usurpers," without authority or function. *Norton*, 118 U.S. at 441-449. They occupied de jure offices and performed the well-defined functions of those offices. Because petitioner has failed to demonstrate that the system of assigning appellate judges that was in place when his appeal was heard by the Court of Military Review prejudiced his right to

receive a fair and impartial trial and appeal, the court's affirmance of his convictions and sentence should be accorded de facto validity.

b. In any event, the issue presented in the petition does not warrant this Court's review because it is of no continuing importance. The Secretary of Transportation (a "Head of Department" within the meaning of the Appointments Clause) has expressly adopted the appointments previously made by the Department's General Counsel. For that reason, the Appointments Clause issue is one that will not affect any new cases, even within the relatively small Coast Guard military justice system.[4]

---

[4] Petitioner suggests (Pet. 7 n.3) that the Secretary's January 15, 1993, appointments may be invalid. He asserts that "[t]he Secretary of Transportation has no explicit authority under the law to appoint the judges of the Court of Military Review"; that the UCMJ "authorizes the Judge Advocate General of each service to appoint the judges of the service Court of Military Review"; and that "[t]he legal provision which generally permits the Secretary to appoint officers of the Department of Transportation should not be applied to support the Secretary's action." Pet. 8 n.3. As he acknowledges, *ibid.*, petitioner's attack on the Secretary's authority is not squarely presented in this case. In any event, it is without merit. The Secretary of Transportation is expressly authorized to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers." 49 U.S.C. 323(a). It is, moreover, the well-established duty of the federal courts to "construe [a] statute to avoid [constitutional] problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Whether or not the UCMJ might otherwise be construed to create an implied exception to the Secretary's appointment authority, it surely should not be so construed if appointment by the Secretary is constitutionally required.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Federal Election Commission* v. *NRA Political Victory Fund*, No. 93-1151 (argued Oct. 11, 1994), and disposed of as appropriate in light of that decision. If this Court decides *NRA Political Victory Fund* without addressing the second question presented in that case, the petition should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

CHARLES J. BENNARDINI
Lieutenant Commander, USCG
Appellate Government Counsel
Commandant (G-LMJ)
United States Coast Guard

NOVEMBER 1994

(3)

No. 94-431

Supreme Court, U.S.
FILED
FEB 17 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE PETITIONER

G Arthur Robbins
2101 Defense Highway
Crofton, MD 21114
(301) 261-0035

Alan B. Morrison
Public Citizen
Litigation Group
2000 P. St., N.W., Ste. 700
Washington, DC 20036
(202) 833-3000

Allen Lotz
Counsel of Record
Christopher S. Keane
Christine M. Nugnes
Commandant (G-L-5)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593-0001
(202) 267-0115

Attorneys for Petitioner

BEST AVAILABLE COPY

31pp

QUESTION PRESENTED

May the *de facto* officer doctrine be relied upon to affirm the acts of civilians improperly appointed to serve as military appellate judges by the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, when those acts include affirming criminal convictions on direct appeal?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. The Military Appellate Judiciary 4

B. Petitioner's Appeals 6

SUMMARY OF ARGUMENT 9

ARGUMENT 10

THE *DE FACTO* OFFICER DOCTRINE CANNOT BE APPLIED IN THIS CASE 10

A. Introduction 11

B. No Authority Permits the Application of the *De Facto* Officer Doctrine to Affirm the Acts of Unconstitutionally Appointed Appellate Judges In a Direct Criminal Appeal 12

C. Applying the *De Facto* Officer Doctrine in This Case Would Be Contrary to This Court's Decision in *Griffith v. Kentucky* 19

D. This Case Does Not Present the Type of Problem the *De Facto* Officer Doctrine Was Intended to Prevent 20

CONCLUSION 23

TABLE OF AUTHORITIES

Cases:

Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984) 12, 17

Ball v. United States, 140 U.S. 118 (1891) 13, 14

Buckley v. Valeo, 424 U.S. 1 (1976) 8, 12

F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978) 19

Federal Election Comm'n v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 2703, *and cert. dismissed*, 115 S. Ct. 537 (1994) 12, 17, 18

Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991) 10, 11, 14

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) ... 15, 16

Griffith v. Kentucky, 479 U.S. 314 (1987) 19, 22

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 19

INS v. Chadha, 462 U.S. 919 (1983) 15

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 19

Los Angeles v. Lyons, 461 U.S. 95 (1983) 20

Marbury v. Madison, 5 U.S. 137 (1805) 20

McDowell v. United States,
159 U.S. 596 (1895) 13, 14

Morrison v. Olson, 487 U.S. 654 (1988) 14

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 15, 18

Norton v. Shelby County, 118 U.S. 425 (1886) 21

Ryan v. Tinsley, 316 F.2d 430 (10th Cir.),
cert. denied, 375 U.S. 17 (1963) 13

Teague v. Lane, 489 U.S. 288 (1989) 22

United States v. Carpenter, 37 M.J. 291
(C.M.A.), *petition for cert. filed*,
62 U.S.L.W. 3411 (U.S. Oct. 29, 1993)
(No. 93-676) 6, 7, 8, 12, 20

Uited States v. Cole, 31 M.J. 270 (C.M.A. 1990) ... 5

United States ex rel. Doss v. Lindsley,
148 F.2d 22 (7th Cir.), *cert. denied*,
325 U.S. 858 (1945) 13

United States v. Kovac, 36 M.J. 521
(C.G.C.M.R. 1992) 8

United States v. Rice, 36 M.J. 264 (C.M.A. 1993) ... 22

United States v. Woodley, 751 F.2d 1008
(9th Cir. 1985) (en banc), *cert. denied*,
475 U.S. 1048 (1986) 14

Ex parte Ward, 173 U.S. 452 (1899) 13

Weiss v. United States,
114 S. Ct. 752 (1994) 7, 11, 12, 15

Constitutional Provisions:

U.S. Const. Art. II, § 2, Cl. 2 ..... 2, 10

Statutes:

Art. 1(1), UCMJ, 10 U.S.C. § 801(1) 5

Art. 6, UCMJ, 10 U.S.C. § 806 5

Art. 18, UCMJ, 10 U.S.C. § 818 6

Art. 26, UCMJ, 10 U.S.C. § 826 6

Art. 66, UCMJ, 10 U.S.C. § 866 ..... 2, 5, 6, 14

Art. 67, UCMJ, 10 U.S.C. § 867 14

Art. 67a, UCMJ, 10 U.S.C. § 867a 2

Art. 75, UCMJ, 10 U.S.C. § 875 4

Art. 76, UCMJ, 10 U.S.C. § 876 ..... 4, 21

Art. 142, UCMJ, 10 U.S.C. § 942 4

28 U.S.C. § 1259(3) 2

National Defense Authorization Act for
Fiscal Year 1995, Pub. L. No. 103-337,
108 Stat. 2663 4

Other Authorities:

R.C.M. 1209, Manual for Courts-Martial, United States, 1984 (1994 Edition) 4, 22

Brief for the United States, *Weiss v. United States*, 114 S. Ct. 752 (1994)(No. 92-1482) 15

Brief for the United States as Amicus Curiae, *FEC v. NRA*, 115 S. Ct. 537 (1994)(No. 93-1151) 18

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-431

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the United States Court of Military Appeals, *United States v. Ryder*, 39 M.J. 454 (C.M.A. 1994) is reprinted as Appendix A to the Petition at App. 1a. The opinion of the United States Coast Guard Court of Military Review, *United States v. Ryder*, 34 M.J. 1077 (C.G.C.M.R. 1992), is reprinted as Appendix B to the Petition at App. 12a. The further decision of the United States Coast Guard Court of Military Review on reconsideration, *United States v.*

Ryder, 34 M.J. 1259 (C.G.C.M.R. 1992), is reprinted as Appendix C to the Petition at App. 25a.

JURISDICTION

The decision of the Court of Military Appeals was issued on June 23, 1994. The petition for a writ of certiorari was timely filed on September 9, 1994, and the petition was granted on January 6, 1995. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice, 10 U.S.C. § 867a (Supp. II 1990) and 28 U.S.C. § 1259(3) (Supp. II 1990).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The relevant provision of the Uniform Code of Military Justice, Article 66, 10 U.S.C. § 866, provides in pertinent part:

> (a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of

one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State.

* * *

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

* * *

STATEMENT OF THE CASE

Petitioner was a Boatswain's Mate Second Class (pay grade E-5), U.S. Coast Guard, at the time of his court-martial in the summer of 1989. He was tried by a general court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of various drug-related

violations of the Uniform Code of Military Justice (UCMJ). His approved sentence, as affirmed by the lower courts, was confinement for three years, forfeiture of $699 per month for thirty-six months, reduction to the lowest enlisted grade (E-1), and a dishonorable discharge. The question presented is whether the constitutional invalidity of the appointments of two of the three judges of the Coast Guard Court of Military Review who heard Petitioner's appeal can be disregarded by invoking the *de facto* officer doctrine.[1]

A. The Military Appellate Judiciary

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the U.S. Court of Military Appeals, which has five civilian judges appointed by the President with the advice and consent of the Senate for fixed terms of office. Art. 142, UCMJ, 10 U.S.C. § 942 (1988).[2]

---

[1] Although Petitioner has already served his entire period of confinement, this case is not moot because the dishonorable discharge remains approved, but unexecuted. The reduction in pay grade and forfeiture of pay have been executed, but could be restored through further proceedings. *See* Art. 75, UCMJ, 10 U.S.C. § 875. The conviction is not yet final. Art. 76, UCMJ, 10 U.S.C. § 876; R.C.M. 1209, Manual for Courts-Martial, United States, 1984 (1994 Edition).

[2] Effective October 5, 1994, the name of the U.S. Court of Military Appeals was changed to the U.S. Court of Appeals for the Armed Forces, and the names of the service Courts of Military Review were changed to the Courts of Criminal Appeals. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994). For simplicity and consistency, the courts involved will continue to be referred to by their former names throughout this brief, because those were their names at all times relevant to this case.

Below the Court of Military Appeals are four Courts of Military Review; one each for the Army, Air Force, Navy–Marine Corps, and Coast Guard. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement for one year or more, a dismissal, or a dishonorable or bad–conduct discharge is part of the approved sentence. Art. 66(b), UCMJ, 10 U.S.C. § 866(b). Courts of Military Review exercise all of the traditional powers of appellate courts, as well as an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court of military review "may affirm only such findings of guilty and the sentence as it finds correct in law and fact . . .. [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Art. 66(c), UCMJ, 10 U.S.C. § 866(c).

Court of Military Review judges may be commissioned officers or civilians, all of whom are selected and assigned to the court by the Judge Advocate General of the service. Art. 66(a), UCMJ, 10 U.S.C. § 866(a). The Judge Advocate General is the official for each service who is responsible for the overall supervision of military justice matters. *See* Art. 6(a), UCMJ, 10 U.S.C. § 806(a). The Judge Advocate General of the Coast Guard is the General Counsel of the Department of Transportation. Art. 1(1), UCMJ, 10 U.S.C. § 801(1).

The Coast Guard Court of Military Review, which reviewed Petitioner's court–martial, consisted (and still consists) of five appellate military judges, two of whom were civilians (Chief Judge Baum and Judge Bridgman) and three of whom were Coast Guard commissioned officers.[3] At the

---

[3] The Coast Guard Court of Military Review is currently the only such

time the Court of Military Review reviewed this case, all of the judges on that court had been appointed by the General Counsel of the Department of Transportation. *United States v. Carpenter*, 37 M.J. 291, 294 (C.M.A.), *petition for cert. filed*, 62 U.S.L.W. 3411 (U.S. Oct. 29, 1993)(No. 93-676); Art. 66(a), UCMJ, 10 U.S.C. § 866(a). Courts of Military Review are typically divided into three-member panels to hear cases; Petitioner's court-martial was reviewed by such a three-member panel. Pet. App. 13a, 25a.

General courts-martial are presided over by military judges who are commissioned officers. Art. 26, UCMJ, 10 U.S.C. § 826. They can try any offense committed by a member of the armed services, and may impose any lawful sentence including death, imprisonment for life or a term of years, total forfeiture of pay and allowances, and a dishonorable or bad-conduct discharge (or a dismissal if the accused is an officer). Art. 18, UCMJ, 10 U.S.C. § 818.

B. Petitioner's Appeals

Petitioner's court-martial conviction and sentence were reviewed by the Coast Guard Court of Military Review, by a panel of judges which consisted of one commissioned officer (Judge Shkor) and two civilians (Chief Judge Baum and Judge Bridgman). Pet. App. 12a, 24a. The constitutionality of the appointment of the military trial and Court of Military Review judges was raised before the Court of Military Review, but was rejected. Pet. App. 24a. The Court of Military Appeals then exercised its discretionary jurisdiction to consider Petitioner's claim that the manner in which the

---

[3] Cont. court to include civilians as judges. The last time any other Court of Military Review included civilian judges was in 1972.

trial and appellate military judges in his case were appointed violated the Appointments Clause of the Constitution. However, while the appeal was pending, this Court ruled in *Weiss v. United States*, 114 S. Ct. 752 (1994), that military judges who are commissioned officers need not receive a separate appointment under the Appointments Clause as a military trial or appellate judge to perform judicial duties. In doing so, the Court specifically declined to decide whether that ruling applied to civilians who may be assigned to the Courts of Military Review. *Id.* at 757 n.4.

In Petitioner's case, the issue reserved by this Court in *Weiss* was not squarely addressed by the Court of Military Appeals, since that court had previously decided the issue in *United States v. Carpenter*, 37 M.J. 291 (C.M.A. 1993). That court's consideration of the issue of the appointment of civilian Court of Military Review judges produced four published opinions, although all judges voted to affirm. Judge Gierke, joined by Judge Cox, authored the opinion of the court. Relying on the court's decision in *Weiss*, he first concluded that the military judge who presided over Carpenter's court-martial and two of the three Coast Guard Court of Military Review judges (the two who were commissioned officers on active duty) who reviewed the court-martial were appointed consistently with the Appointments Clause. *Carpenter*, 37 M.J. at 293. However, with respect to the civilian member of the Court of Military Review panel in *Carpenter*, its prior decision in *Weiss* was not controlling.

The Government argued that the appointment of Chief Judge Baum (and, by implication, Judge Bridgman) was properly made by the Secretary of Transportation through delegation to the Judge Advocate General. It also argued that, since the civilian judges were retired military officers, their

appointments were proper because they remained commissioned officers whose appointments as such made a separate appointment as a court of military review judge unnecessary.[4] The court rejected both of those arguments, and concluded that the appointment of civilians to the Court of Military Review violated the Appointments Clause. *Carpenter*, 37 M.J. at 294–295. However, in a one–sentence ruling, citing only this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), a civil action seeking declaratory and injunctive relief, not a criminal appeal, the Court of Military Appeals afforded *de facto* validity to the acts of the civilian judge, and affirmed the decision of the Court of Military Review. Chief Judge Sullivan and Judge Wiss both concurred separately based on the *de facto* appointment rationale. *Carpenter*, 37 M.J. at 300–301. Judge Crawford relied on her separate opinion in *Weiss* (36 M.J. at 234–240), and concurred in the result with respect to the Appointments Clause issue. *Carpenter*, 37 M.J. at 300.[5]

---

[4] Both Chief Judge Baum and Judge Bridgman are retired military officers, but are employed and serving in civilian billets. *See United States v. Kovac*, 36 M.J. 521, 525 (C.G.C.M.R. 1992).

[5] On January 15, 1993, the then–Secretary of Transportation, Andrew Card, signed a memorandum purporting to appoint all the judges of the Coast Guard Court of Military Review, including Chief Judge Baum and Judge Bridgman. Because that action occurred well after the decisions of the Court of Military Review in this case, the validity of those appointments is not at issue here. For the same reason, it was not at issue in *Carpenter*, either, and so the views expressed in *Carpenter* on the validity of the Secretary's memorandum are mere dicta. Furthermore, if the Government's position is correct, there was no need for the Secretary to reappoint the two civilian judges, even after *Carpenter*, since presumably they could have continued to decide cases as *de facto* officers as long as they remained on the court.

SUMMARY OF ARGUMENT

This case seeks to ensure that the separation of powers requirements and protections embodied in the Appointments Clause are available to those tried by courts-martial whose cases are reviewed by the Courts of Military Review. More specifically, the issue is whether the *de facto* officer doctrine can be relied upon to save the acts of military appellate judges who were not appointed in accordance with the specific requirements of the Appointments Clause when the issue of their unconstitutional appointments was raised before the court involved, and two of the appellate judges on the case were invalidly appointed.

No case cited by the Government or found by Petitioner supports the application of the *de facto* officer doctrine to a situation like this. The cases in which the doctrine has been applied are all substantially different from the situation presented in this case. None has ever applied the doctrine in a direct criminal appeal where the challenge is to the appointment of a judicial officer who sat on the defendant's case. Moreover, there are several cases in which application of the *de facto* officer doctrine would have provided a simple way to resolve the case, but it was not applied. These cases illustrate the limitations of the doctrine.

Application of the doctrine in this case would deny Petitioner the benefit of a favorable ruling on the underlying issue of the constitutionality of the appointments of the appellate judges involved. Such a result would be contrary to this Court's precedents holding that judicial decisions in both criminal and civil cases cannot be applied prospectively only, and that the law announced in a case must be applied to the litigants in that case.

This case simply does not present the type of problem the *de facto* officer doctrine was created to avoid. The doctrine was developed as a matter of necessity to avert the confusion and chaos which would result from decisions, often highly technical, which would invalidate the acts of a public official taken months or years before. Thus, the doctrine protects the public and third parties who relied on the acts of the officeholder. In a direct criminal appeal such as this, in which the issue was raised before the court on which the improperly-appointed judges sat, there are no third parties who relied to their detriment on the defective appointments. In addition, the number of cases that would be affected by a ruling in favor of the Petitioner would be small; cases that are already final could not be reopened. Therefore, no chaos or confusion would result.

ARGUMENT

THE *DE FACTO* OFFICER DOCTRINE CANNOT BE APPLIED IN THIS CASE.

A. Introduction

The Appointments Clause of the Constitution, Art. II, § 2, cl. 2, sets strict limits on the power and methods of appointing officers of the United States. The most senior, or principal officers, may be appointed only by the President, with the advice and consent of the Senate. "Inferior" officers may be appointed by the President alone, the heads of departments, or the courts of law, if Congress has so provided by law. U.S. Const. art. II, § 2, cl. 2; *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991). The Appointments Clause is part of the "Constitution's structural

separation of powers." *Id.* at 873. In addition to protecting against the encroachment of one Branch's power at the expense of another Branch, the Appointments Clause protects against the diffusion of the power of appointment. *Id.* at 878. The appointments at issue here represent an impermissible diffusion of the appointment power.

The Appointments Clause limits the potential holders of the power to appoint inferior officers to a small group of officials who are themselves politically accountable. Appellate military judges, who exercise extraordinary authority and discretion, are at least inferior officers of the United States and are subject to the Appointments Clause. *Weiss v. United States*, 114 S. Ct. 752, 757 (1994). The Judge Advocate General of the Coast Guard is neither the President, the head of a department, nor a court of law; accordingly, appointment of civilians to judicial service in the Armed Forces by him does not satisfy the Appointments Clause. *Id.*

The Solicitor General, in his brief in opposition to the petition for a writ of certiorari, did not contest the ruling in *Carpenter* that the appointment of the civilian judges to the Coast Guard Court of Military Review was invalid. Thus, the only question remaining is whether the *de facto* officer doctrine can be relied upon to affirm the acts of civilians improperly appointed to serve as military appellate judges by the Judge Advocate General, in a case in which the accused raised this issue during the direct appeal of his case.

B. No Authority Permits the Application of the De Facto Officer Doctrine to Affirm the Acts of Unconstitutionally Appointed Appellate Judges In a Direct Criminal Appeal.

The Court of Military Appeals upheld Carpenter's (and Petitioner's) conviction and sentence, despite the improper appointment of Chief Judge Baum, a civilian, of the Coast Guard Court of Military Review, by relying on the *de facto* officer doctrine. *Carpenter*, 37 M.J. at 295. In reaching that result, however, the court devoted only a single sentence to discussing the issue, and cited only one case, *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley*, however, was an action seeking declaratory and injunctive relief to enjoin the operation of the Federal Election Commission on Appointments Clause and separation of powers grounds, not a direct appeal of a criminal conviction, and does not support the action of the lower court. Neither *Buckley*, nor any other case cited by the Government in its briefs to this Court in *Weiss* or *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 2703, *and cert. dismissed*, 115 S. Ct. 537 (1994)--the two recent cases in which the Government has sought to rely on the doctrine--supports its applicability here.

The *de facto* officer doctrine was developed to limit the circumstances in which government actions can be challenged by attacking the title of the officeholder responsible for the action. The doctrine is not simple, nor its limits yet clearly determined. *See Andrade v. Lauer*, 729 F.2d 1475, 1496-1501 (D.C. Cir. 1984). However, one proposition is clear--it has never been applied in a case with circumstances similar to the case at bar.

Most of the cases cited by the Government in its previous briefs, in which the *de facto* officer doctrine was

applied, are civil cases, not criminal, and the criminal cases most often involved collateral attacks on state criminal convictions in federal court. *See United States ex rel. Doss v. Lindsley*, 148 F.2d 22 (7th Cir.), *cert. denied*, 325 U.S. 858 (1945); *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir.), *cert. denied*, 375 U.S. 17 (1963); *see also Ex parte Ward*, 173 U.S. 452, 454 (1899) (doctrine used in a criminal case to defeat collateral attack on the validity of a judge's title to office).

Two federal criminal cases in which the doctrine was relied on to sustain convictions on direct appeal are *McDowell v. United States*, 159 U.S. 596 (1895), and *Ball v. United States*, 140 U.S. 118 (1891). In *McDowell*, the doctrine was merely an alternative basis for affirming the conviction, and the facts involved were very different from those in this case. The defect alleged in *McDowell* was that proper procedures had not been followed in arranging for an assignment of a properly appointed federal judge from one district to sit in another district within the same circuit. The judge in question had not presided over the defendant's trial, nor was he present when the grand jury had returned the indictment. Rather, his only role was presiding when the grand jury was first sworn and impaneled. Under those circumstances, this Court refused to overturn the defendant's conviction for what was, at most, a highly technical violation of a statute, if a violation at all.

In *Ball*, the *de facto* officer doctrine was cited in a situation in which a properly appointed federal trial judge had been properly assigned from one district to fill a temporary vacancy in another, but his period of service slightly exceeded the express length of the assignment. More significantly, the convictions involved were reversed on other grounds, so the *de facto* officer doctrine was not essential to the resolution of the case.

Both *McDowell* and *Ball* concerned highly technical, non-constitutional violations of statutes for the assignment of properly appointed judges to serve outside their usual districts. By contrast, Petitioner's case concerns the successful constitutional challenge to the basic appointments of two of the three appellate judges involved in his appeal as of right, an appeal in which those judges have extraordinary, broad powers of review over both the legal and factual aspects of the conviction and sentence. *See* Art. 66(c), UCMJ, 10 U.S.C. § 866(c), and discussion at page 5, *supra*. These powers are particularly important because the Court of Military Review is the only avenue of judicial appeal as of right for most military appellants; further appeal to the Court of Military Appeals is by discretionary petition for grant of review. Art. 67, UCMJ, 10 U.S.C. § 867.

The inapplicability of the doctrine to Petitioner's case can be seen most easily by examining those cases in which it was not applied, but in which the doctrine would have provided an easy way to dispose of the case had it been applicable. Thus, in *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991), the Court could have avoided deciding the question of whether the Tax Court was a Court of Law or a Department under the Appointments Clause, which divided the Court 5-4, since the special trial judges there were clearly at least *de facto* officers.

Similarly, in *Morrison v. Olson*, 487 U.S. 654 (1988), determination of the constitutionality of the independent counsel statute would have been unnecessary since the doctrine, had it been applicable, would have sufficed to at least allow the independent counsel to enforce a grand jury subpoena, which was the specific action challenged there.

In *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1048 (1986), the court

of appeals divided 7–4 in a direct criminal appeal, but upheld a recess appointment of a district judge in the face of a claim that the appointment was inconsistent with the requirements of Article III, yet neither the majority nor dissenting opinions even mentioned the *de facto* officer doctrine.

Finally, in *Weiss*, the Court could have avoided the serious constitutional questions presented there if the *de facto* officer doctrine applied, as the Government urged, because the military judges involved were obviously acting at least as judges in fact. *See* Brief for the United States at 22–24, *Weiss v. United States*, 114 S. Ct. 752 (1994)(No. 92–1482).[6]

It is possible that the *de facto* officer doctrine was simply overlooked in many of these and other cases, such as *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), but that seems unlikely. The failure to rely upon the doctrine in those cases is best explained by its inapplicability either to a direct attack on a statutory scheme or, as here, when two judges directly involved in a criminal case have been appointed to their positions in violation of the Constitution.

In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the issue was the constitutionality of the assignment of judges of the Court of Claims and Court of Customs and Patent Appeals to sit on federal district courts. The decision involved both civil and criminal cases. The Court recognized that it would be well advised to decide the cases on narrower grounds, if any were available. One of the narrower grounds urged upon the Court to dispose of the cases was the *de facto* officer doctrine.

---

[6] Indeed, taken to its logical conclusion, the members of Congress who exercised the legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), could be considered "*de facto* officers" whose actions would, under the Government's theory, be unchallengeable.

The argument was made that the judges involved were at least *de facto* officers whose assignments to the district courts could not be challenged by the petitioners. *Id.* at 535. The Court, after a review of the doctrine, rejected the argument that the *de facto* officer doctrine could be applied to the judges whose appointments were at issue in *Glidden*. *Id.* at 535–536.

Glidden illustrates the point that the *de facto* officer doctrine applies principally when the basis for the challenge to the officeholder's status is a technical defect, or when the challenge is a collateral attack on a prior judicial ruling. It does not apply when the defect is more than technical, and implicates a strong policy concerning the proper functioning of the government as reflected in the Constitution. *Id.* While the specific defect in the appointment of the judges involved in this case (appointment by an official not authorized by the Appointments Clause to receive the power to appoint officers) differs from the defect at issue in *Glidden* (lack of the tenure and compensation protections of Article III of the Constitution), they are both rooted in the Constitution. As in *Glidden*, the defect relates to a "basic constitutional protection," the separation of powers, in this case as embodied in the Appointments Clause. *Id.* at 536. As the Court did in *Glidden*, it should do here--not permit the *de facto* officer doctrine to save the Government from the consequences of an unconstitutional appointment.

Glidden also makes it clear that Petitioner need not demonstrate any specific harm resulting from the improper appointment. The participation of the civilian judges of the Coast Guard Court of Military Review, whose appointments were made improperly in violation of the explicit provisions of the Appointments Clause, provides a sufficient basis to invalidate the action of the Court of Military Review. *See Glidden*, 370 U.S. at 533.

Two decisions of the District of Columbia Circuit in which the *de facto* officer doctrine was discussed are instructive. *Andrade v. Lauer*, 729 F.2d 1475 (D.C. Cir. 1984), involved a challenge by current and former federal employees to actions of federal officials (a reduction in force). One of the bases of the challenge was that the actions of the officials were invalid because they had not been properly appointed. In response, those officials argued that the *de facto* officer doctrine precluded any challenge to their actions on that ground. *Id.* at 1496. The Court of Appeals noted that application of the doctrine in that case would apparently leave the plaintiffs without any remedy. *Id.* at 1497. The court rejected any interpretation of the doctrine "that would likely make it impossible for these plaintiffs to bring their assumedly substantial constitutional claim and would render legal norms concerning appointment and eligibility to hold office unenforceable." *Id.* at 1498.

Applying the analysis of *Andrade* to Petitioner's case would preclude reliance on the *de facto* officer doctrine. If the doctrine is applied, it leaves Petitioner without a remedy for the violation of his right to have his court-martial reviewed by a Court of Military Review composed of military appellate judges who have been properly appointed, even though he raised the appointment issue while his case was being reviewed by the Court of Military Review. Pet. App. 26a.

The other recent case in which the District of Columbia Circuit discussed the *de facto* officer doctrine, but rejected its applicability, is *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. granted*, 114 S. Ct. 2703, *and cert. dismissed*, 115 S. Ct. 537 (1994). There, an issue concerning the constitutionality of the composition of the Federal Election Commission was raised

as a defense in a civil enforcement action brought by the Commission. *Id.* at 822. The Commission argued that the constitutional claim was not justiciable because the *de facto* officer doctrine would prevent the NRA from obtaining a remedy in any event. *Id.* at 828. In rejecting application of the doctrine in a way that would prevent a ruling on the constitutional issues, the court noted that the Supreme Court, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), found that the scheme by which bankruptcy judges were appointed was unconstitutional, but provided relief to the party who challenged the scheme even though the opinion was to act prospectively only. *FEC v. NRA*, 6 F.3d at 828.

Moreover, as the Solicitor General noted in his brief in *FEC v. NRA*, in which he urged the applicability of the doctrine, that case did not challenge an adjudication by a person alleged to have been improperly appointed, but only a decision to investigate and then prosecute a case that would be decided by an admittedly properly appointed Article III judge. Brief for the United States as Amicus Curiae at 26–27, *FEC v. NRA*, 115 S. Ct. 537 (1994)(No. 93–1151). This case, in contrast, presents an even more serious problem, because the improperly appointed officials involved were judges who actually decided the case on appellate review.

Accordingly, because no authority has ever applied the *de facto* officer doctrine in a direct criminal appeal where the challenge is to the appointment of a judicial officer who sat on the defendant's case, and all of the cases relied on by the Government involve very different circumstances, the decision below cannot stand.

C. Applying the De Facto Officer Doctrine in This Case Would Be Contrary to This Court's Decision in Griffith v. Kentucky.

In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court held that any newly declared constitutional rule for the conduct of a criminal case must be applied to all cases then pending on direct review. *Id.* at 321–322. The reasons for this holding included the nature of judicial review itself, and the principle of treating similarly situated litigants similarly. *Id.* at 322–323. Even when the new rule is a "clear break" with past precedent, it must be applied to criminal cases not yet final. *Id.* at 326–328; *see also Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991)(retroactive application of new rule cannot be denied civil litigants in the case that changes the rule).

A decision in favor of the Government in this case would allow the Government to introduce through the back door of the *de facto* officer doctrine, what it could not get through the front door of a decision with purely prospective effect. In essence, it would carve out an exception to *Griffith* for cases in which the constitutional defect relates to the appointment of an official involved in the case, even when the validity of that appointment had been raised, as here, at the time of the action by the improperly appointed officer. It would leave no remedy for such a constitutional defect.

Indeed, if the doctrine were relevant in a case like this, it would always be determinative of any question concerning appointment to office, and would always preclude a ruling on the merits of the constitutional claim because to do otherwise would be to render an advisory opinion. *See F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 734–735 (1978)(federal courts do not have authority to issue advisory opinions). In

other words, the use of the *de facto* officer doctrine as it was applied by the Court of Military Appeals in *Carpenter*, *supra*, would effectively remove all such claims from judicial review and thereby allow Congress or the Executive to violate the explicit provisions of the Appointments Clause with impunity, because the *de facto* officer doctrine would always prevent a court from reaching the merits of the issue of the challenged appointment.

It is particularly inappropriate to apply the *de facto* officer doctrine in a criminal case, since it is unlikely that anyone could ever bring an anticipatory challenge to the appointment of a judge before being subject to the authority of that judge with the possibility of being adversely affected. *See Los Angeles v. Lyons*, 461 U.S. 95 (1983). Application of the doctrine to this case would leave Petitioner without a remedy for the violation his right to have his court-martial reviewed by a constitutionally-appointed court; that situation would conflict with the long-standing principle of judicial review that if there is a right, there must be a remedy for its violation. *See Marbury v. Madison*, 5 U.S. 137, 162-167 (1805).

D. This Case Does Not Present the Type of Problem the De Facto Officer Doctrine Was Intended to Prevent.

In order to fill most governmental positions, federal or state, a series of requirements must be met, some constitutional and some statutory. From time to time, mistakes may be made, such that, when a governmental action is challenged, the objecting party may argue that the person taking the action did not properly hold the office involved, and hence the action is invalid. The *de facto* officer doctrine was developed as a matter of policy and necessity to limit the circumstances in which government actions can be challenged

by attacking the title of the officeholder responsible for the action. The primary purpose of the doctrine is to protect the public and third parties who have relied on the acts of the officeholder and who would be adversely affected by a finding that the acts of the *de facto* officer were invalid, and to avoid the confusion and chaos which would result. *Norton v. Shelby County*, 118 U.S. 425, 441–442 (1886). This type of harm would be at its worst when the attack on the appointment of the officeholder occurs long after the appointment is made, and the defect is of a technical nature which could have and would have been readily cured had it been called to the government's attention in a timely fashion. *Id.*

There are no "third parties" involved here who have relied to their detriment on the acts of the improperly appointed officials involved in this case. Petitioner certainly did not rely on the acts of the officials; he contested their power to act. The Government, as the only other involved party, is not simply an innocent third party which relied to its detriment on the acts of the officials. The Government created the flawed appointment process in the first place, was aware of the issue, and chose to do nothing to correct the problem.

The significant public interest in avoiding confusion and chaos is protected by the concept of finality of judicial decisions. Petitioner is not advocating the reopening of already final decisions of the Coast Guard Court of Military Review. Only those cases still open on direct appeal and in which the issue of the defective appointments of the Court of Military Review judges was raised and preserved would be affected if this Court holds that the *de facto* officer doctrine does not protect the acts of those judges. Cases which are already final would not be affected. *See* Art. 76, UCMJ, 10

U.S.C. § 876; R.C.M. 1209, Manual for Courts-Martial, United States, 1984 (1994 Edition); *see also Teague v. Lane*, 489 U.S. 288, 305-316 (1989); *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987); *but see United States v. Rice*, 36 M.J. 264 (C.M.A. 1993)(Court of Military Appeals will accept out-of-time requests for relief in cases in which petitions for grant of review raising Appointments Clause issues were previously denied if the Supreme Court affords relief in a case involving an Appointments Clause issue).

With this in mind, it is clear there would be no serious adverse affect on the public and no chaos or confusion. The number of cases which would be affected by a decision in favor of Petitioner is quite small, because the decision would apply only to the Coast Guard, only to cases not yet final, and only to those in which the accused preserved the issue in a timely manner. There are approximately ten other cases in which the accused is situated identically to Petitioner (*i.e.*, issue raised at the Court of Military Review, preserved in further appeals, and the Court of Military Review decision occurred before January 15, 1993) which would be directly affected by a reversal here. The *de facto* officer doctrine can not be invoked to protect the public against such a minor disturbance in the orderly conduct of the business of the nation when the right of Petitioner to have constitutionally appointed judges decide his criminal appeal is at stake.

CONCLUSION

For the reasons stated, Petitioner prays that this Court reverse the judgment of the Court of Military Appeals, and remand the case for a new hearing of his appeal in the Coast Guard Court of Military Review.

Respectfully submitted,

G Arthur Robbins
2101 Defense Highway
Crofton, MD 21114
(301) 261–0035

Alan B. Morrison
Public Citizen
Litigation Group
2000 P. St., N.W., Ste. 700
Washington, DC 20036
(202) 833–3000

Allen Lotz
Counsel of Record
Christopher S. Keane
Christine M. Nugnes
Commandant (G–L–5)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593–0001
(202) 267–0115

Attorneys for Petitioner

February 1995

Supreme Court, U.S.
FILED
MAR 23 1995
CLERK

No. 94-431

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

PAUL M. GEIER
Assistant General Counsel for Litigation
Department of Transportation
Washington, D.C. 20590

CHARLES J. BENNARDINI
Lieutenant Commander, USCG
Senior Appellate Government Counsel

JOHN F. KOEPPEN
Lieutenant Commander, USCG
Appellate Government Counsel
Commander (G-LMJ)
United States Coast Guard
Washington, D.C. 20593

QUESTION PRESENTED

Whether the United States Court of Military Appeals correctly affirmed petitioner's conviction despite its conclusion that the civilian members of the Coast Guard Court of Military Review had been selected for their positions in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
A. Military justice overview	2
B. The Coast Guard Court of Military Review	6
C. The instant case	7
Summary of argument	10
Argument:	
The acts of the civilian judges who reviewed petitioner's conviction should be accorded de facto validity despite the existence of an Appointments Clause violation	13
I. A defect in an officer's appointment does not mandate that the officer's acts be invalidated when that result is contrary to the public interest	13
II. The civilian judges' past judicial acts were correctly determined to be de facto valid	22
III. The decision of the Court of Military Appeals does not violate the constitutional prohibition against advisory opinions, and it is consistent with this Court's decision in *Griffith* v. *Kentucky*	31
Conclusion	36

TABLE OF AUTHORITIES

Cases:

Allen v. *State Board of Elections*, 393 U.S. 544 (1969)	16
American Trucking Ass'ns v. *Smith*, 496 U.S. 167 (1990)	19, 35
Ball v. *United States*, 140 U.S. 118 (1891)	15
Batson v. *Kentucky*, 476 U.S. 79 (1986)	34, 35
Buckley v. *Valeo*, 424 U.S. 1 (1976)	10, 13, 14, 16, 17, 18, 22
Butler v. *McKellar*, 494 U.S. 407 (1990)	20, 30
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	16

Cases—Continued: Page

Cipriano v. *City of Houma*, 395 U.S. 701 (1969) 16, 17
Coleman v. *Thompson*, 501 U.S. 722 (1991) 28
Douglas v. *California*, 372 U.S. 353 (1963) 27, 28
Dynes v. *Hoover*, 61 U.S. (20 How.) 65 (1857) 32
EEOC v. *Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981) 15
England v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) 16
Evitts v. *Lucey*, 469 U.S. 387 (1985) 27
Freytag v. *Commissioner of Internal Revenue*, 501 U.S. 868 (1991) 11-12, 22, 23, 28
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 25, 26, 28
Goeke v. *Branch*, No. 94-898 (Mar. 20, 1995) 26
Green v. *Skulute*, 839 F. Supp. 797 (D. Wyo. 1993) 31
Griffin v. *Illinois*, 351 U.S. 12 (1956) 27
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 13, 19, 29, 34, 35
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 20
Harper v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993) 19, 34
James B. Beam Distilling Co. v. *Georgia*, 501 U.S. 529 (1991) 11, 18, 19, 34
Jones v. *Barnes*, 463 U.S. 745 (1983) 26
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 33, 34
McDowell v. *United States*, 159 U.S. 596 (1895) 15, 16
McKane v. *Durston*, 153 U.S. 684 (1894) 26
Middendorf v. *Henry*, 425 U.S. 25 (1976) 29
Mistretta v. *United States*, 488 U.S. 361 (1989) 22
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 16, 17, 32
Norton v. *Shelby County*, 118 U.S. 425 (1886) 11, 15
Ortwein v. *Schwab*, 410 U.S. 656 (1973) 26
Parker v. *Levy*, 417 U.S. 733 (1974) 28
Penry v. *Lynaugh*, 492 U.S. 302 (1989) 20
Preiser v. *Newkirk*, 422 U.S. 395 (1975) 32

Cases—Continued: Page

Ryan v. *Tinsley*, 316 F.2d 430 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963) 16
Saint Francis College v. *Al-Khazraji*, 481 U.S. 604 (1987) 16
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 30-31
Solorio v. *United States*, 483 U.S. 435 (1987) 26, 28
Teague v. *Lane*, 489 U.S. 288 (1989) 30
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) .. 32
United States v. *Augenblick*, 393 U.S. 348 (1969) 30
United States v. *Carpenter*, 37 M.J. 291 (C.M.A. 1993), petition for cert. pending, No. 93-676 ..... 6, 7, 9, 10, 14, 20, 21, 25, 30, 35
United States v. *Cole*, 31 M.J. 270 (C.M.A. 1990) 5
United States v. *Estate of Donnelly*, 397 U.S. 286 (1970) 20
United States v. *Kovac*, 36 M.J. 521 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993) 6, 7
United States v. *Leon*, 468 U.S. 897 (1984) 20, 33
United States v. *Munoz-Flores*, 495 U.S. 385 (1990) 23
United States v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 28 (C.M.A. 1993) 8
United States v. *Townsend*, petition for review granted in part, 41 M.J. 121 (C.M.A. 1994) 30
United States ex rel. Doss v. *Lindsley*, 148 F.2d 22 (7th Cir.), cert. denied, 325 U.S. 858 (1945) 11, 15
United States National Bank of Oregon v. *Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173 (1993) 32
Wainwright v. *Sykes*, 433 U.S. 72 (1977) 30
Waite v. *City of Santa Cruz*, 184 U.S. 302 (1902) 15
Weiss v. *United States*, 114 S. Ct. 752 (1994) 2, 4, 9, 23, 24, 25, 26, 27

Constitution and statutes:

U.S. Const.:
Art. I 2

Constitution and statutes—Continued: Page

Art. I, § 8, Cl. 14 2
Art. II, § 2, Cl. 2 (Appointments Clause) ..... *passim*
Art. III 12, 16, 18, 20, 25, 31, 32
Amend. IV 20, 33
Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335:
§ 9, 82 Stat. 1336 3
§ 27, 82 Stat. 1341 5
National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2831-2832 4
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 1(1), 10 U.S.C. 801(1) 4
Art. 16(1), 10 U.S.C. 816(1) 3
Art. 16(2), 10 U.S.C. 816(2) 3
Art. 16(3), 10 U.S.C. 816(3) 2
Art. 18, 10 U.S.C. 818 3
Art. 19, 10 U.S.C. 819 3
Art. 20, 10 U.S.C. 820 2
Art. 25, 10 U.S.C. 825 3
Art. 26, 10 U.S.C. 826 ..... 3, 4, 9, 24
Art. 51, 10 U.S.C. 851 3
Art. 60, 10 U.S.C. 860 3
Art. 66, 10 U.S.C. 866 ..... 5, 9, 27
Art. 66(a), 10 U.S.C. 866(a) 5, 7, 9
Art. 67, 10 U.S.C. 867 (Supp. V 1993) 6
Art. 76, 10 U.S.C. 876 30
Art. 112a, 10 U.S.C. 912(a) 7
Art. 134, 10 U.S.C. 934 7
Art. 142, 10 U.S.C. 142 (Supp. V 1993) 6
Voting Rights Act of 1965, § 5, 42 U.S.C. 1973c 16
10 U.S.C. 101(a)(4) (Supp. V 1993) 4
10 U.S.C. 531 4
10 U.S.C. 3037 4
10 U.S.C. 5148 4
10 U.S.C. 8037 4
14 U.S.C. 1 4
14 U.S.C. 211 4
49 U.S.C. 323(a) 21

Miscellaneous: Page

Index and Legislative History, Uniform Code of Military Justice (1950) 5
Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. (1949) 5

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-431

JAMES D. RYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-10a) is reported at 39 M.J. 454. The initial opinion of the United States Coast Guard Court of Military Review (now called the United States Coast Guard Court of Criminal Appeals) (Pet. App. 11a-22a) is reported at 34 M.J. 1077. The opinion of the Coast Guard Court of Military Review on reconsideration (Pet. App. 23a-25a) is reported at 34 M.J. 1259.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on June 23, 1994. The petition for a writ of certiorari was filed on September 9, 1994, and was

granted on January 6, 1995. 115 S. Ct. 713. The jurisdiction of this Court rests on 28 U.S.C. 1259(3) (Supp. V 1993).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, provides as follows:

> [The President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATEMENT

A. Military Justice Overview

Pursuant to Article I of the Constitution, Congress has established three tiers of military courts. See U.S. Const. Art. I, § 8, Cl. 14; see *Weiss* v. *United States*, 114 S. Ct. 752, 755-756 (1994). At the trial level are the courts-martial, of which there are three types: summary, special, and general. The summary court-martial adjudicates only minor offenses, has jurisdiction only over enlisted service members, and can be conducted only with their consent. It is presided over by a single commissioned officer who can impose up to one month of confinement and other relatively modest punishments. Arts. 16(3), 20, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816(3), 820.

The special court-martial usually consists of a military judge and three court-martial members,[1] although the Code allows the members to sit without a judge, or the accused to elect to be tried by the judge alone. Art. 16(2), UCMJ, 10 U.S.C. 816(2). A special court-martial has jurisdiction over most offenses under the UCMJ. The maximum punishment that it may impose, however, is six months' confinement, three months of hard labor without confinement, a bad-conduct discharge, partial and temporary forfeitures of pay, and a reduction in rank. Art. 19, UCMJ, 10 U.S.C. 819.

The general court-martial consists of either a military judge and at least five members, or the judge alone if the accused so requests. Art. 16(1), UCMJ, 10 U.S.C. 816(1).[2] A general court-martial has jurisdiction over all offenses under the UCMJ and may impose any lawful sentence, including death. Art. 18, UCMJ, 10 U.S.C. 818.

The military judge acts as presiding officer at a special or general court-martial. Art. 26, UCMJ, 10 U.S.C. 826. The judge rules on all legal questions and instructs court-martial members regarding the law and procedures to be followed. Art. 51, UCMJ, 10 U.S.C. 851. The members decide guilt or innocence and impose sentence unless the trial is before the judge alone. *Ibid.* No sentence imposed becomes final until it is approved by the officer who convened the court-martial. Art. 60, UCMJ, 10 U.S.C. 860.

---

[1] Court-martial members may be officers or enlisted personnel, depending on the military status of the accused; the members' responsibilities are analogous to, but somewhat greater than, those of civilian jurors. See Art. 25, UCMJ, 10 U.S.C. 825.

[2] The position of military judge has officially existed only since passage of the Military Justice Act of 1968, Pub. L. No. 90-632, § 9, 82 Stat. 1336.

Military trial judges must be commissioned officers of the armed forces and members of the bar of a federal court or a State's highest court. Art. 26, UCMJ, 10 U.S.C. 826. All commissioned officers are appointed by the President with the advice and consent of the Senate. See 10 U.S.C. 531 (Department of Defense); 14 U.S.C. 211 (Coast Guard). The judges are selected and certified as qualified by the Judge Advocate General of their branch of the armed forces.[3] The judges do not serve for fixed terms and may perform judicial duties only when assigned to do so by the appropriate Judge Advocate General. This Court has found the manner of assignment of commissioned officers as trial judges by the Judge Advocate General to be consistent with the requirements of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. *Weiss*, 114 S. Ct. at 759.

At the next tier are the four Courts of Criminal Appeals (formerly known as Courts of Military Review),[4] one each for the Army, Air Force, Coast Guard,

---

[3] In the Coast Guard, the Judge Advocate General is the General Counsel of the Department of Transportation, Art. 1(1), UCMJ, 10 U.S.C. 801(1), while the Judge Advocate General for the Army, Navy, Marine Corps, and Air Force is the principal legal officer for that service. See 10 U.S.C. 3037 (Army); 10 U.S.C. 5148 (Navy-Marine Corps); 10 U.S.C. 8037 (Air Force). Although the Coast Guard is an "agency" within the Department of Transportation, it is also an armed service at all times. See 10 U.S.C. 101(a)(4); 14 U.S.C. 1.

[4] Effective October 5, 1994, Section 924 of the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2831-2832, redesignated the several Courts of Military Review as Courts of Criminal Appeals. Section 924 also redesignated the Court of Military Appeals—the highest court within the military justice system—as the Court of Appeals for the Armed Forces. For the sake of clarity, this brief will refer to those courts as the Coast Guard Court of Military Review and the Court

and Navy-Marine Corps. Those courts, which usually sit in three-judge panels, review all cases in which the sentence imposed exceeds one year of confinement, involves the dismissal of a commissioned officer, or involves the punitive discharge of an enlisted service member. Art. 66, UCMJ, 10 U.S.C. 866. The courts may review de novo both factual and legal findings,[5] and they may overturn convictions and sentences. *Ibid.*

The position of appellate military judge first came into existence with the creation of the Courts of Military Review by the Military Justice Act of 1968, Pub. L. No. 90-632, § 27, 82 Stat. 1341. Appellate judges may be commissioned officers or civilians, but each must be a member of a bar of a federal court or of a State's highest court. Art. 66, UCMJ, 10 U.S.C. 866.[6] The judges are selected and assigned to serve by the appropriate Judge Advocate General. *Ibid.* Like military trial judges,

---

of Military Appeals—their names at the time they ruled on petitioner's case.

[5] As the Court of Military Appeals has noted, "[t]his awesome, plenary, *de novo* power of review grants unto the Court of Military Review authority to, indeed, substitute its judgment for that of the [trial] court members." *United States* v. *Cole*, 31 M.J. 270, 272 (1990) (internal quotation marks omitted).

[6] Article 66(a) of the UCMJ expressly authorizes the service of civilian judges on the Courts of Military Review. See 10 U.S.C. 866(a) ("Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians."). The legislative history indicates that the use of civilian judges was authorized by Congress at the request of the Coast Guard, which desired the flexibility, due to its small number of lawyers, to appoint a civilian judge to the court. See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 1189 (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* (1950).

appellate judges do not serve for a fixed term. With the exception of the two retired commissioned officers on the Coast Guard Court who serve in a civilian capacity, all appellate military judges in all of the military services are commissioned officers.

Atop the system is the Court of Appeals for the Armed Forces (formerly known as the Court of Military Appeals, see note 4, *supra*). That court consists of five civilian judges who are appointed by the President, with the advice and consent of the Senate, for fixed terms of 15 years. Arts. 67, 142, UCMJ, 10 U.S.C. 867, 942 (Supp. V 1993).

B. The Coast Guard Court of Military Review

The Coast Guard Court of Military Review is composed of five appellate judges, three of whom are active-duty commissioned officers in the pay grade of O-6. *United States* v. *Carpenter*, 37 M.J. 291, 293-295 (C.M.A. 1993), petition for cert. pending, No. 93-676 (filed Oct. 29, 1993). The other two members of the court are "civilians," serving in the civilian pay grade of GS-15. Those two judges—Chief Judge Joseph H. Baum and Associate Judge Alfred F. Bridgman, Jr.—are retired commissioned officers who attained the military pay grade of O-6 before retirement. *Ibid.*; *United States* v. *Kovac*, 36 M.J. 521, 525 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 29 (C.M.A. 1993).[7]

---

[7] Both Chief Judge Baum and Associate Judge Bridgman were first assigned as appellate military judges while still on active duty. Chief Judge Baum was assigned to the Navy-Marine Corps Court of Military Review in 1976 as an active-duty Navy Captain. *Kovac*, 36 M.J. at 526. He served in that capacity until 1982, when he retired from active duty. *Ibid.* Associate Judge Bridgman was appointed to the Coast Guard Court of Military Review in 1975, while still on active duty. *Ibid.* He served in that capacity until his retirement from active duty in 1977. *Ibid.* After his

Before January 15, 1993, members of the Coast Guard Court of Military Review were appointed by the General Counsel of the Department of Transportation, who is also the Judge Advocate General for the United States Coast Guard. *Carpenter*, 37 M.J. at 294; see note 3, *supra*.[8] On that date, the Secretary of Transportation issued a memorandum stating that "[t]he assignment of appellate military judges to the Coast Guard Court of Military Review, as reflected in the General Counsel's memo of April 20, 1992, is adopted this date as judicial appointments of my own." See *Carpenter*, 37 M.J. at 294 n.1, 300.

C. The Instant Case

Petitioner, a member of the United States Coast Guard, was convicted at a general court-martial of 11 specifications of marijuana use, three specifications of use of lysergic acid diethylamide (LSD), one specification of cocaine use, one specification of soliciting Coast Guard personnel to use LSD, and one specification of soliciting Coast Guard personnel to distribute LSD, in violation of Articles 112a and 134 of the UCMJ, 10 U.S.C. 912a, 934. Pet. App. 12a, 24a. He was sentenced to five years' confinement, forfeiture of $699 per month for 60 months, reduction to the lowest enlisted pay grade (E-1), and a dishonorable discharge from the Coast Guard. *Id.* at 2a. The convening authority reduced the period of confinement to three years and the period of forfeitures

---

retirement, he was again assigned to the same court in 1978 and has served continuously since that time. *Ibid.*

[8] The Judge Advocate General is authorized to "establish a Court of Military Review" and to "designate" one of the appellate military judges as chief judge. Article 66(a), UCMJ, 10 U.S.C. 866(a).

to three years but approved the adjudged sentence in all other respects. *Ibid.*

Petitioner appealed to the Coast Guard Court of Military Review. He contended that (1) his convictions resulted from the improper admission of evidence, (2) his sentence was disproportionately harsh, and (3) he had been denied effective assistance of counsel. See Pet. App. 12a-13a. When petitioner's appeal was heard, the judges of the Coast Guard Court of Military Review were serving pursuant to appointments by the General Counsel. Petitioner's panel consisted of Chief Judge Baum and Associate Judge Bridgman, the civilian judges, and Judge Shkor, a commissioned officer. *Id.* at 12a, 24a.

The court affirmed petitioner's convictions and sentence. Pet. App. 11a-22a. In response to petitioner's motion, the court ordered reconsideration of its decision. See *id.* at 24a. On reconsideration, petitioner argued, *inter alia*, that the method of assigning judges to the Court of Military Review violated the Appointments Clause of the Constitution. The court rejected that contention on the authority of *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), aff'd mem., 39 M.J. 28 (C.M.A. 1993). Pet. App. 24a-25a.

Approximately one year later, the Court of Military Appeals held in *Carpenter* that the method by which the Chief Judge of the Coast Guard Court of Military Review had been selected before January 15, 1993, violated the Appointments Clause. The government argued in that case that "because the Chief Judge of the Coast Guard Court of Military Review is a retired Navy captain, he is already an Officer of the United States by virtue of his military commission, so he does not need a second judicial appointment to serve as an appellate military judge." 37 M.J. at 294-295. The Court of Military Appeals rejected that contention on two bases. First, the

court stated that "Chief Judge Baum is not acting in his capacity as a Navy captain when he sits as an appellate military judge," explaining that "the billet for the Chief Judge is a civilian billet" and that the Chief Judge "is paid as a civilian employee." *Id.* at 295. Second, the court found that "Chief Judge Baum's duties as Chief Judge are not 'germane' to the duties of a retired Navy officer." *Ibid.* Accordingly, the court concluded that the selection of a civilian as Chief Judge by the Judge Advocate General, who was not the "Head[] of [a] Department[]," violated the Appointments Clause. *Id.* at 294.[9]

The Court of Military Appeals concluded, however, that Carpenter's conviction and sentence should be

[9] This Court concluded in *Weiss* v. *United States*, 114 S. Ct. 752, 757 (1994), that "those serving as military judges must be appointed pursuant to the Appointments Clause." All of the trial and appellate judges whose appointments were at issue in *Weiss* were active-duty commissioned officers—a position that requires appointment by the President with the advice and consent of the Senate. See *ibid.* This Court recognized that Congress, in Articles 26 and 66 of the UCMJ, 10 U.S.C. 826, 866, did not require a second appointment to the position of military judge before the assumption of judicial duties. 114 S. Ct. at 760. The Court also concluded that the Appointments Clause itself does not require a second appointment before military officers may discharge the duties of military judge. *Ibid.* The Court noted, however, that "[t]he constitutionality of the provision allowing civilians to be assigned to Courts of Military Review, without being appointed pursuant to the Appointments Clause, obviously presents a different question." *Id.* at 757 n.4 (citing Art. 66(a), UCMJ, 10 U.S.C. 866(a)). The government does not contest the holding in *Carpenter* that the manner in which the civilian judges of the Coast Guard Court of Military Review had been selected before January 15, 1993, violated the Appointments Clause.

affirmed despite the constitutional flaw in the appointment process. The court explained:

> We next turn to the question of the effect of the Chief Judge's defective appointment. Just as the acts of the federal election commissioners were accorded *de facto* validity in *Buckley v. Valeo*, 424 U.S. [1,] 142 [(1976) (per curiam)], * * * we hold that the judicial acts of the Chief Judge are entitled to *de facto* validity. Accordingly, we hold that the decision of the Court of Military Review in this case is valid, notwithstanding the defective appointment of the Chief Judge.

Carpenter, 37 M.J. at 295.

In the present case, petitioner argued in the Court of Military Appeals that the appellate review of his court-martial by the Court of Military Review should be set aside on the ground that the two civilian judges of the Court of Military Review who participated in his case were unconstitutionally appointed. Relying on *Carpenter*, the Court of Military Appeals declined to afford him relief on that basis. Pet. App. 2a n.1. The Court of Military Appeals also rejected petitioner's contention that his convictions had been based on improperly admitted evidence. See *id.* at 1a-10a. The Court of Military Appeals therefore affirmed the judgment of the Coast Guard Court of Military Review. *Id.* at 10a.

SUMMARY OF ARGUMENT

1. The Court of Military Appeals correctly applied *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam), in holding that the prior judicial acts of the civilian judges of the Coast Guard Court of Military Review should be accorded de facto validity. It has long been the law,

under the de facto officer doctrine, that "[a] person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945). The de facto officer doctrine "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton* v. *Shelby County*, 118 U.S. 425, 441 (1886).

Similar concerns have led this Court to determine, in appropriate cases, that decisions regarding the legality of an officer's appointment or exercise of power should be given prospective application only. The Court in such decisions "has never been required to distinguish the remedial from the choice-of-law aspect of its decision," *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 536 (1991) (opinion of Souter, J.). In this case, the decision of the Court of Military Appeals to accord de facto validity to the acts of civilian members of the Coast Guard Court of Military Review, despite the Appointments Clause violation, should be understood to rest on remedial rather than on choice-of-law principles. The Court of Military Appeals acknowledged that an Appointments Clause violation had occurred; it simply determined that the unconstitutional manner of the civilian judges' appointments did not entitle a defendant to vacatur of the Coast Guard Court of Military Review's decisions.

2. The Appointments Clause reinforces the "structural integrity" of the Constitution by preventing the encroachment of one branch of government upon another and "by preventing the diffusion of the appointment power." *Freytag* v. *Commissioner of Internal Revenue*,

501 U.S. 868, 878 (1991). The purpose of the Appointments Clause is not principally to safeguard individual rights and liberties. Nor is there is any reason to believe that the constitutional violation in this case affected the outcome of petitioner's appeal.

Because petitioner's personal rights were not violated, and he indeed possessed no constitutional entitlement to appellate review of any sort, vacatur of the decision of the Coast Guard Court of Military Review could be defended only as a means of increasing the incentive for litigants to raise Appointments Clause challenges, thereby decreasing the likelihood that violations would escape judicial resolution. Whatever the merits of that mode of analysis in other contexts, it has no application to the military justice system. In light of the significant need for order and stablility in military society in general and in the military justice system in particular, courts have exercised restraint before intervening in military affairs. This Court should refrain from requiring disruptive remedies for the military justice system, when those remedies are solely justified to encourage the enforcement of structural provisions unrelated to the interests of the defendant servicemen.

3. The Court of Military Appeals' determination that the existence of an Appointments Clause violation did not mandate vacatur of the decision of the Coast Guard Court of Military Review was not an impermissible advisory opinion. First, the Court of Military Appeals is not an Article III court and consequently is not subject to the constitutional prohibition of advisory opinions. In any event, the court's action is not properly characterized as advisory. In a prior case, the court thoroughly explicated its ultimate determination that the decision of the Coast Guard Court of Military Review should be affirmed despite the violation it found—no different in

principle from an opinion explaining that a defendant's trial involved a deprivation of constitutional rights but that the error was harmless beyond a reasonable doubt.

Finally, there is no merit to petitioner's contention that the Court of Military Appeals' decision conflicts with this Court's holding in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). The Court of Military Appeals concluded that vacatur of the lower court's decision was not an appropriate remedy for the Appointments Clause violation, and it declined to afford relief either to the defendant who litigated the claim or to similarly situated defendants. The principle upon which *Griffith* rests—that similarly situated criminal defendants should not receive different treatment simply because of the happenstance that one case rather than another is used as the vehicle for the announcement of a new rule—therefore has no application to the present case.

ARGUMENT

THE ACTS OF THE CIVILIAN JUDGES WHO REVIEWED PETITIONER'S CONVICTION SHOULD BE ACCORDED DE FACTO VALIDITY DESPITE THE EXISTENCE OF AN APPOINTMENTS CLAUSE VIOLATION

I. A Defect In An Officer's Appointment Does Not Mandate That The Officer's Acts Be Invalidated When That Result Is Contrary To The Public Interest

In *Buckley* v. *Valeo*, 424 U.S. 1, 142 (1976) (per curiam), this Court held that the Federal Election Commission as then composed could not constitutionally exercise the power to enforce or administer the campaign finance laws, because it violated the Appointments Clause of the Constitution for Congress itself to select the members

of a commission vested with such powers. *Id.* at 140-142. The Court concluded, however, that the defective appointment of the commissioners did not require invalidation of their past acts. The Court explained:

> [T]he Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date * * *. The past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan.

Id. at 142 (citing cases).

Relying on *Buckley*, the Court of Military Appeals ruled in *United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993), petition for cert. pending, No. 93-676 (filed Oct. 29, 1993), that the judicial acts of the civilian Chief Judge of the Coast Guard Court of Military Review are "entitled to *de facto* validity," despite the violation of the Appointments Clause in his appointment. In our view, that holding is correct. The question whether the Constitution was violated by the method of appointment of an officer of the United States is distinct from the question whether the violation requires that the officer's past acts be invalidated. This Court's cases teach that the latter issue—a remedial question—implicates the public interest, and that the public's legitimate reliance on the stability of government action can justify according de facto validity to the acts of a defectively appointed officer.

A. This Court has long recognized, through the de facto officer doctrine, the public interest in validating

the actions of public officers despite flaws in their appointment. See, *e.g.*, *Norton* v. *Shelby County*, 118 U.S. 425, 441-449 (1886); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 323 (1902). Under that doctrine, "[a] person actually performing the duties of an office under color of title is an officer de facto, and his acts as such officer are valid so far as the public or third parties who have an interest in them are concerned." *United States ex rel. Doss* v. *Lindsley*, 148 F.2d 22, 23 (7th Cir.), cert. denied, 325 U.S. 858 (1945).

The de facto officer doctrine, which limits the extent to which acts of officers may be invalidated on the ground of purported defects in the legality of their appointment or election, "is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby." *Norton*, 118 U.S. at 441. Accord *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) ("The *de facto* officer doctrine was developed to protect the public from the chaos and uncertainty that would ensue if actions taken by individuals apparently occupying government offices could later be invalidated by exposing defects in the officials' titles."). It is therefore well established that "where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *McDowell*, 159 U.S. at 602. Where the de facto officer doctrine has been applied, this Court has typically declined to address the legal validity of the officer's appointment or election, on the theory that any defect in the manner of the officer's selection furnished no basis for a "collateral attack" on his acts in office. *Ball*, 140 U.S. at 129; see also *McDowell*, 159 U.S.

at 601-602; *Lindsley*, 148 F.2d at 23; *Ryan* v. *Tinsley*, 316 F.2d 430, 432 (10th Cir.), appeal dismissed, cert. denied, 375 U.S. 17 (1963).

In more recent decisions, the Court has also recognized the public interest in avoiding the retroactive invalidation of the acts of public officials. In contrast to the de facto officer cases, however, the more recent decisions have addressed and decided issues concerning the constitutional validity of the challenged officers' appointments or exercises of power, but have determined that the decision upholding the constitutional claim should be given prospective effect only. See *Buckley* v. *Valeo*, *supra* (Appointments Clause violation); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (plurality opinion) (finding unconstitutional Congress's grant of judicial power to non-Article III bankruptcy judges, but declining to invalidate prior acts of those judges); *id.* at 92 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment); *Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) (per curiam) (finding voting restriction unconstitutional, but declining to invalidate municipal securities issued by the unconstitutionally elected body); *Allen* v. *State Board of Elections*, 393 U.S. 544, 572 (1969) (finding violation of Section 5 of the Voting Rights Act of 1965, but giving "only prospective effect to our decision").[10] The Court characterized its action in

[10] In other contexts as well, the Court has occasionally determined that a newly announced rule of law should not be given retroactive effect. See *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608-609 (1987); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422 (1964).

Buckley as according "*de facto* validity" to the past official acts. *Buckley*, 424 U.S. at 142.

When the Court has determined to apply a holding prospectively only, it has invoked considerations closely related to those that underlie the de facto officer doctrine. In *Northern Pipeline*, for example, the plurality explained that retroactive application of its holding "would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts." 458 U.S. at 88 (plurality opinion); see also *id.* at 92 (Rehnquist, J., concurring in the judgment). The Court therefore stayed its judgment to "afford Congress an opportunity to constitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *Id.* at 88. And in *Cipriano*, 395 U.S. at 706, the Court declined to impose "[s]ignificant hardships" and "substantial inequitable results" on cities that had issued bonds authorized by invalidly elected bodies.

From the decisions discussed above emerge two principles that are central to the Court's resolution of this case. First, a legal defect in the manner of an officer's appointment does not automatically necessitate invalidation of that officer's prior acts. The Court in *Buckley* applied that principle, moreover, even though the flaw in the officers' appointment was constitutional in nature, and even though the powers exercised by the commissioners included quasi-adjudicatory functions. See 424 U.S. at 140 ("All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office

itself.").[11] Second, in determining how a new legal rule is to be applied to the parties before it, a court may legitimately take account of the reasonable expectations held by the parties and the public generally at the time of the conduct whose legality is at issue.

B. Like this Court in *Buckley* and *Northern Pipeline*, the Court of Military Appeals in *Carpenter* issued a "purely prospective" decision, in which the new rule announced by the decision is not applied to past conduct, whether of the parties who litigated the issue or of others, but rather is made "effective with respect to all conduct occurring after the date of that decision." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 536 (1991) (opinion of Souter, J.).[12] In prior cases in

---

[11] Similarly in *Northern Pipeline*, the Court applied its decision prospectively despite the fact that judges lacking the tenure and salary protections of Article III had been permitted to adjudicate civil actions that, as a constitutional matter, could properly be assigned (within the federal system) only to Article III judges.

[12] In *Beam*, Justices Souter and Stevens expressly reserved the question whether "pure" prospectivity was permissible, 501 U.S. at 544, while acknowledging that in some cases the Court had followed that course, *id.* at 536 (citing, *inter alia*, *Buckley* v. *Valeo*, *supra*). The Chief Justice and Justices White, O'Connor, and Kennedy would have held in *Beam* that the Court could decline, in an appropriate case, to apply newly announced rules of law to the parties before it. 501 U.S. at 544-547 (White, J., concurring in the judgment); *id.* at 549-559 (O'Connor, J., dissenting). Justices Marshall, Blackmun, and Scalia would have held that prospective decisionmaking violated Article III. *Id.* at 547-548 (Blackmun, J., concurring in the judgment); *id.* at 548-549 (Scalia, J., concurring in the judgment).

Beam itself involved the different question whether a court could engage in "selective prospectivity," in which a court "appl[ies] a new rule in the case in which it is pronounced, then return[s] to the old one with respect to all others arising on facts predating the pronouncement." *Beam*, 501 U.S. at 537 (opinion of

which the Court has declined to give "retroactive effect" to newly announced rules of law, the Court has not been "required * * * to distinguish the two senses in which retroactivity may be used." *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 209 (1990) (Stevens, J., dissenting, joined by Brennan, Marshall & Blackmun, JJ.). "A decision may be denied '*retroactive* effect' in the sense that conduct occurring prior to the date of decision is not judged under current law, or it may be denied 'retroactive *effect*' in the sense that independent principles of law limit the relief that a court may provide under current law." *Ibid.* That distinction, as Justice Souter noted in *Beam*, is between "the remedial" and "the choice-of-law" aspect of judicial decisionmaking. 501 U.S. at 536 (opinion of Souter, J.).

If the prospectivity determination is regarded as a decision concerning choice of law, its effect would be to treat past conduct that contravenes a newly established rule *as lawful*, on the ground that the conduct predated the rule's announcement. To regard the issue as one of remedy, in contrast, is to say that in determining the *relief* to be awarded for a legal violation, a court may attach significance to the fact that the prevailing rule of law was understood differently when the conduct in

---

Souter, J.). The Court has definitively rejected that practice, holding that "[w]hen [the Supreme] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2517 (1993). The Court previously rejected the practice of selective prospectivity in criminal cases in *Griffith* v. *Kentucky*, 479 U.S. 314 (1987). This case involves no issue of "selective prospectivity."

question occurred, that disruption of past affairs may be against the public interest, and that the relief for violations that occurred before the present decision may differ from the relief awarded for identical violations that occur afterwards. Whatever the merits of pure prospectivity as a choice-of-law principle, the exercise of equitable discretion in the formulation of remedies is consistent with Article III. In particular, consideration of reliance interests in determining appropriate relief is fully in keeping with traditional conceptions of the judicial role. See *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295-297 (1970) (Harlan, J., concurring).[13]

In our view, the decision of the Court of Military Appeals in *Carpenter* is properly understood as resting on remedial rather than on choice-of-law principles. The court did not purport to hold that the participation of the civilian judge on the Coast Guard Court of Military Review was lawful at the time the Court of Military Review heard Carpenter's case. To the contrary, its analysis made clear that the Appointments Clause violation existed at the time of that appeal. See 37 M.J. at 294-295. Rather, having concluded that the civilian

---

[13] Indeed, in a variety of contexts, the availability of a particular remedy for unlawful government conduct may depend upon whether the illegality of that conduct was clearly established at the time of its occurrence. See, *e.g.*, *Butler* v. *McKellar*, 494 U.S. 407, 414 (1990) (habeas corpus); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813-819 (1982) (qualified immunity); *United States* v. *Leon*, 468 U.S. 897, 918-921 (1984) (Fourth Amendment exclusionary rule). Protection of reliance interests in that manner is particularly justified where the requested remedy serves to deter future violations and thereby advance societal interests, rather than to vindicate rights personal to the individual litigant. See *Leon*, 468 U.S. at 906-908; cf. *Penry* v. *Lynaugh*, 492 U.S. 302, 352 (1989) (Scalia, J., concurring in part and dissenting in part).

judge's participation "does not satisfy the Appointments Clause," the court next considered "the question of the effect of the [civilian judge's] defective appointment." *Id.* at 295. Its affirmance of the Coast Guard Court of Military Review's decision was thus based not on the theory that the civilian judge had been properly appointed (under some prior interpretation of the Appointments Clause), but on the theory that the unconstitutional manner of that judge's appointment did not entitle Carpenter to the remedy of vacatur of the lower court's ruling.

The Court of Military Appeals did not directly address the question whether *future* rulings of the Coast Guard Court of Military Review would be vacated if the government failed to eliminate the constitutional infirmity. That question was, in any event, highly theoretical, because by the time of the Court of Military Appeals' ruling in *Carpenter*, the civilian judges on the Coast Guard Court of Military Review had received new appointments from the Secretary of Transportation—a head of a department—and they were therefore appointed in compliance with the Constitution. See *Carpenter*, 37 M.J. at 294 n.1, 300.[14] The court's citation to *Buckley*,

[14] In his brief on the merits, petitioner appears to acknowledge the constitutionality of those appointments, by requesting that this Court "reverse the judgment of the Court of Military Appeals, and remand the case for a new hearing of his appeal in the Coast Guard Court of Military Review." Pet. Br. 23. In his petition for a writ of certiorari, however, petitioner suggested that the Secretary's January 15, 1993, appointments to the Coast Guard Court of Military Review might be unauthorized by statute and therefore invalid. See Pet. 7 n.3. As we noted in our brief in opposition (Br. in Opp. 8 n.4), the validity of the January 15, 1993, appointments is not squarely presented in this case, and petitioner's attack on those appointments is in any event without merit. See 49 U.S.C. 323(a) (Secretary of Transportation is

however, at least suggests that the Court of Military Appeals would vacate rulings if the violation were not remedied—*i.e.*, that the remedy for future Appointments Clause violations would have been different from those that had occurred in the past.

As we show below, that exercise of remedial discretion by the Court of Military Appeals was justified. In light of the nature of the violation, the insubstantial and speculative nature of any impact it may have had on petitioner's appeal, the absence of any constitutional requirement of appellate review within the military justice system, and the substantial public interest in avoiding disruption of that system, the decision to frame relief prospectively only should be upheld.

II. The Civilian Judges' Past Judicial Acts Were Correctly Determined To Be De Facto Valid

A. The Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, requires that principal officers of the United States be appointed by the President with the advice and consent of the Senate. Inferior officers may be appointed by the President alone, the Head of a Department, or a court of law. The Appointments Clause is deeply rooted in separation-of-powers principles. See *Buckley*, 424 U.S. at 124. Although this Court has focused its separation-of-powers jurisprudence on the danger of one branch aggrandizing its power at the expense of another, see, *e.g.*, *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 878 (1991) (citing *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989)), the Appointments Clause "not only guards against this

---

authorized to "appoint and fix the pay of officers and employees of the Department of Transportation and [to] prescribe their duties and powers").

encroachment but also preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 501 U.S. at 878. See also *id.* at 880 ("The structural interests protected by the Appointments Clause are not those of any one branch of Government, but of the entire Republic.").

In a general sense, of course, such structural requirements of the separation of powers can be said to "safeguard liberty." *United States* v. *Munoz-Flores*, 495 U.S. 385, 395 (1990). But the central purpose of limiting the appointment power in the Executive Branch to the President and the Heads of Departments is to ensure that appointments are made in a politically accountable fashion. *Freytag*, 501 U.S. at 884 ("The Framers understood * * * that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."); *id.* at 886 ("The[] heads [of Cabinet-level departments] are subject to the exercise of political oversight and share the President's accountability to the people."). That objective has no direct role in protecting individual rights and liberties. Here, for example, any protection that petitioner would have enjoyed if his conviction were reviewed by judges appointed by a head of a department rather than the Judge Advocate General would be tangential at best. Indeed, in holding in *Weiss* v. *United States*, 114 S. Ct. 752 (1994), that military judges are "Officers of the United States" who must be selected in accordance with the Appointments Clause, the Court did not suggest that officers so appointed would be more

protective of defendants' rights than would judges appointed (as in this case) by a Judge Advocate General.[15]

Petitioner does not maintain that the method of appointing judges to the Coast Guard Court of Military Review before the Secretarial appointment of January 15, 1993, had an actual adverse effect on the outcome of his case. He does not even contend that the system of assigning appellate judges that was in place when his case was reviewed by the Court of Military Review was *likely* to impair his right to receive a fair and impartial appellate review. Nor is there any reason to believe that the civilian judges who considered petitioner's appeal were either insufficiently concerned with the rights of defendant servicemen or insufficiently qualified to exercise their assigned functions. Indeed, both civilian judges who sat on petitioner's appeal to the Coast Guard Court of Military Review had previously served as appellate military judges, pursuant to constitutionally valid appointments, before their retirement as active-duty officers. See note 7, *supra*. The insubstantial likelihood that the constitutional infirmity affected the outcome of petitioner's appeal bears heavily on the determination of appropriate relief.[16]

---

[15] In rejecting the due process challenge in *Weiss*, the Court noted that under Article 26 of the UCMJ, 10 U.S.C. 826, military trial judges are placed under the authority of the service's Judge Advocate General. *Weiss*, 114 S. Ct. at 762. The Court concluded that this structure helps to protect the military judge's independence. *Ibid.*

[16] The likelihood of prejudice from the Appointments Clause violation here was further diminished by petitioner's right to seek further review, in the United States Court of Military Appeals, of his challenges to the manner in which his trial was conducted. As this Court observed in *Weiss*, the Court of Military Appeals "has

Petitioner argues that the approach taken by the Court of Military Appeals in *Carpenter* "would effectively remove all [Appointments Clause] claims from judicial review and thereby allow Congress or the Executive to violate the explicit provisions of the Appointments Clause with impunity, because the *de facto* officer doctrine would always prevent a court from reaching the merits of the issue of the challenged appointment." Pet. Br. 20. The Court of Military Appeals in *Carpenter*, however, did not cite or apply the "de facto officer doctrine," and it did not decline to adjudicate the merits of Carpenter's Appointments Clause claim. Rather, it squarely held that the civilian member of the Coast Guard Court of Military Review had been unconstitutionally appointed, but it affirmed the court's decision on the ground that "the judicial acts of the [civilian judge] are entitled to *de facto* validity." 37 M.J. at 295. That disposition ensured that the underlying legal issue did not go unresolved, while taking account of the lack of prejudice to the defendant in the formulation of an appropriate remedy for the constitutional violation.[17]

---

demonstrated its vigilance in checking any attempts to exert improper influence over military judges." 114 S. Ct. at 762.

[17] For similar reasons, petitioner's reliance (Br. 16) on *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-536 (1962) (opinion of Harlan, J.), is misplaced. Petitioner argues (Br. 16) that the de facto officer doctrine "does not apply when the defect is more than technical, and implicates a strong policy concerning the proper functioning of the government as reflected in the Constitution." As we have explained, however, the court below did not apply the "de facto officer doctrine"—which would have obviated the need to adjudicate the constitutional issue—but instead accorded de facto validity to an official's actions *after* deciding the constitutional issue, as this Court did in *Buckley* and *Northern Pipeline*.

B. Petitioner contends that the Court of Military Appeals' decision will leave him "without a remedy for the violation [of] his right to have his court-martial reviewed by a constitutionally-appointed court." Pet. Br. 20. Petitioner does not, however, identify the source of such a "right." While Congress has established a system of appellate review in the military, "[t]his Court has long recognized that, even in criminal cases, due process does not require a State to provide an appellate system." *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973). Accord, *e.g.*, *Goeke* v. *Branch*, No. 94-898 (Mar. 20, 1995) (per curiam), slip op. 6; *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Any contention that the Constitution requires appellate review of a criminal conviction would be particularly unfounded in the context of the military justice system, since "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. 435, 447 (1987); see also *id.* at 448 (Court has "adhered to this principle of deference in a variety of

---

Moreover, petitioner is not assisted by Justice Harlan's conclusion that the de facto officer principle was inapplicable to the Article III violation charged in *Glidden*. *Buckley* and *Northern Pipeline* make clear that separation-of-powers violations, whether arising under the Appointments Clause or Article III, do not invariably mandate retrospective relief. In any event, *Glidden* involved the life tenure and compensation of Article III judges, which were "*designed in part for the benefit of litigants.*" *Glidden*, 370 U.S. at 536 (opinion of Harlan, J.) (emphasis added), while this case involves a violation of the Appointments Clause, which has at most an indirect and attenuated connection to the individual rights of defendants appearing before military appellate judges selected by the Coast Guard's Judge Advocate General rather than by the "Head[] of [a] Department[]."

contexts where * * * the constitutional rights of servicemen were implicated"); *Weiss*, 114 S. Ct. at 760-761. Petitioner, therefore, was not constitutionally entitled to *any* appellate review of his criminal convictions and sentence. Rather, his right of appeal to the Coast Guard Court of Military Review was conferred only by statute, see Art. 66, UCMJ, 10 U.S.C. 866.

The fact that Congress was not required to provide petitioner with appellate review of his convictions and sentence does not bear on the question whether an Appointments Clause violation occurred in this case. Although Congress was under no obligation to create appellate military judgeships, the persons who occupy the judgeships that Congress chose to create are "Officers of the United States" whose selection is governed by the Appointments Clause. See *Weiss*, 114 S. Ct. at 757 ("those serving as military judges must be appointed pursuant to the Appointments Clause"). But while two of the appellate judges in this case were unconstitutionally appointed, it cannot properly be said that petitioner was thereby deprived of a constitutional *right*. And that consideration is quite relevant to the determination whether petitioner's conviction should be vacated as an appropriate remedy for the Appointments Clause violation that has occurred.[18]

---

[18] This Court has held that if the government chooses to provide appellate review of criminal convictions, its conduct of the appellate process is subject to constitutional constraints. See *Griffin* v. *Illinois*, 351 U.S. 12 (1956) (indigent appellant in criminal case must be provided with trial transcript at state expense); *Douglas* v. *California*, 372 U.S. 353 (1963) (right to appointed counsel in first appeal as of right); *Evitts* v. *Lucey*, 469 U.S. 387 (1985) (right to effective assistance of counsel in first appeal as of right). Those decisions are best understood as resting on the "equality demanded by the Fourteenth Amendment,"

C. In light of "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers," *Freytag*, 501 U.S. at 879 (quoting *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Harlan, J.)), vacatur of the decision of the Coast Guard Court of Military Review could be defended as a judicially defined means of deterring violations of the Appointments Clause. Automatic vacatur of actions taken by officers chosen in violation of the Appointments Clause would concededly increase the incentive for litigants to raise Appointments Clause challenges, and thus decrease the likelihood that violations would persist because of the absence of a judicial check. A rule of vacatur might thereby be said to serve the interests "of the entire Republic," *Freytag*, 501 U.S. at 880, "by preventing the diffusion of the appointment power" that the Constitution forbids, *id.* at 878.

Whatever the merits of the deterrent rationale in other contexts, however, it has no application to the military justice system. This Court has frequently recognized the "very significant differences between military law and civilian law and between the military community and the civilian community," *Parker* v. *Levy*, 417 U.S. 733, 752 (1974), and the consequent need for judicial reluctance to intervene in military affairs. See, *e.g.*, *Solorio*, 483 U.S. at 444 (citing cases). The military justice system is an important means of maintaining

---

Douglas, 372 U.S. at 358, which forbids excessive disparities in the treatment of indigent and non-indigent defendants. See *Coleman* v. *Thompson*, 501 U.S. 722, 755-756 (1991) (discussing *Douglas* and *Evitts*). Here, by contrast, petitioner does not contend that vacatur of the decision of the Coast Guard Court of Military Review is necessary to ensure that he is not unfairly disadvantaged vis-a-vis any similarly situated class of criminal defendants.

order and discipline within the armed services. Accordingly, the enforcement of the rulings of that system should not lightly be set aside. Of course, this Court is required to ensure that military trials are free from constitutional violations actually prejudicial to the accused. This Court need not insist, however, that the military justice system be used as a vehicle for the enforcement of structural constitutional provisions that have only a tangential relationship to the interests of the defendant servicemen. Cf. *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) ("Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference.").[19]

D. To require readjudication of petitioner's appeal would impose significant burdens on the Coast Guard justice system. If that relief is granted to petitioner, it must also be granted in all other cases pending on direct review in which the issue has been preserved. See *Griffith* v. *Kentucky*, 479 U.S. 314, 321-322 (1987). In addition to the instant case, there are seven cases currently pending before this Court in which the issue

[19] As noted above, see pages 21-22, *supra*, the Court of Military Appeals' citation to *Buckley* at least suggests that the court would have vacated future decisions of the Coast Guard Court of Military Review, despite the absence of prejudice to the defendants, if the Appointments Clause violation had not been cured. The court's willingness to use vacatur (or at least the threat of vacatur) to ensure prospective compliance did not, however, oblige the court to vacate decisions issued before its announcement of the constitutional rule.

has been preserved.[20] One such case is also pending before the Court of Military Appeals.[21] Although we agree with petitioner's assertion (Pet. Br. 21) that "[c]ases which are already final would not be affected" if this Court were to grant petitioner's request for relief, a decision in petitioner's favor would be likely to spawn extensive collateral litigation in addition to those cases pending on direct review.[22] The importance to the Coast

---

[20] In addition to *Carpenter*, *supra*, the petition for certiorari in *Clark* v. *United States*, No. 93-966 (filed Dec. 20, 1993), presents the same Appointments Clause challenge on behalf of six defendants whose convictions were affirmed by the Court of Military Appeals.

[21] See *United States* v. *Townsend*, petition for review granted in part, 41 M.J. 121 (C.M.A. 1994).

[22] Article 76 of the UCMJ, 10 U.S.C. 876, provides that "[t]he appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive." This Court has held, however, that "[t]he legislative history of [Article 76] makes clear that relief by way of habeas corpus was an implied exception to that finality clause." *United States* v. *Augenblick*, 393 U.S. 348, 349-350 (1969). Particularly in light of the limitations on habeas review announced in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Teague* v. *Lane*, 489 U.S. 288 (1989); and *Butler* v. *McKellar*, 494 U.S. 407 (1990), we believe that such collateral challenges would ultimately fail, even if this Court orders that the decision of the Coast Guard Court of Military Review be vacated in this case. The prospect of extensive litigation respecting convictions that have become final is, however, a relevant consideration in determining the appropriate remedy for the Appointments Clause violation. We note as well that persons convicted by military courts have frequently attempted (with mixed success) to employ avenues of collateral review other than habeas corpus to attack the validity of their convictions. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S.

Guard and the public of avoiding disruptive liti-gation and consequent waste of government resources may properly be considered in formulating an appro-priate remedy for the Appointments Clause violation at issue here.

Petitioner contends that "[t]here are no third parties involved here who have relied to their detriment on the acts of the improperly appointed [civilian judges]." Pet. Br. 21. That argument ignores the interests of the officers and enlisted members of the Coast Guard, their dependents, and the public generally, who rely upon the Coast Guard's system of military justice to reinforce order and discipline within the service. The Coast Guard Court of Military Review and its judges are an integral part of that system. In light of petitioner's failure to demonstrate any meaningful likelihood of prejudice from the Appointments Clause violation, the public interest in a stable military justice system supports the Court of Military Appeals' disposition of this case.

III. The Decision Of The Court Of Military Appeals Does Not Violate The Constitutional Prohibition Against Advisory Opinions, And It Is Consistent With This Court's Decision In *Griffith* v. *Kentucky*

A. Petitioner suggests that a court that declines to afford any remedy beyond a declaration of the applicable law must refrain from ruling on the merits of the constitutional issue "because to do otherwise would be to

738, 751 (1975) ("certain remedie.. alternative to habeas, particularly suits for backpay, historically have been available" to persons convicted of military offenses "if the court-martial lacked jurisdiction"); *Green* v. *Skulute*, 839 F. Supp. 797, 801-802 (D. Wyo. 1993).

render an advisory opinion." Pet. Br. 19. That argument is flawed in two respects.

First, the general prohibition against the issuance of advisory opinions by federal courts is grounded in the "case or controversy" requirement of Article III. See, *e.g.*, *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 113 S. Ct. 2173, 2178 (1993); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947) ("the federal courts established pursuant to Article III of the Constitution do not render advisory opinions"). Because the Court of Military Appeals is not an Article III court,[23] that prohibition does not apply here. Thus, even if the Court of Military Appeals' discussion of the Appointments Clause issue in *Carpenter* were properly characterized as an advisory opinion, the issuance of that opinion would have violated no constitutional command.[24]

[23] See *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (Congress's "power to provide for the trial and punishment of military and naval offences * * * is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, * * * the two powers are entirely independent of each other"); *Northern Pipeline*, 458 U.S. at 66 (plurality opinion).

[24] This Court's consideration of the remedial question presented creates no risk of an impermissible advisory opinion. The Court is not required to rule on the merits of petitioner's Appointments Clause challenge, since the government does not contest the Court of Military Appeals' holding that an Appointments Clause violation occurred. The only question before the Court is whether that violation entitles petitioner to vacatur of the Coast Guard Court of Military Review's decision—a question whose resolution is plainly essential to the Court's determination of the rights of the parties.

In any event, the *Carpenter* opinion is not properly characterized as advisory. It is instead a thorough explication of the Court of Military Appeals' ultimate determination that the decision of the Coast Guard Court of Military Review should be affirmed. It is in principle no different from an opinion explaining that a defendant's trial involved a deprivation of constitutional rights but that the error was harmless.[25] Of course, a reviewing court will sometimes decline to reach the merits of the defendant's claim on the ground that any error was harmless. We are aware of no decision, however, suggesting that a federal court is constitutionally *required* to resolve the issue of harmlessness before it considers the merits of the underlying claim.[26]

[25] In *United States* v. *Leon*, *supra*, the Court recognized a limited good-faith exception to the Fourth Amendment exclusionary rule but noted that "[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly raise live controversies which Art. III empowers federal courts to adjudicate. As cases addressing questions of good faith immunity under 42 U.S.C. § 1983 and cases involving the harmless-error doctrine make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases." 468 U.S. at 924-925 (citations omitted). The Court concluded that "[i]f the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue." *Id.* at 925.

[26] In *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court stated:

> In the order in which the court has viewed this subject, the following questions have been considered and decided.

B. In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), this Court considered the question whether its decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986), should be applied retroactively to other cases pending on direct review. The Court determined that "after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." 479 U.S. at 322-323. The Court emphasized that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.* at 323. Petitioner contends (Pet. 19-20) that the Court of Military Appeals' decision in *Carpenter* is contrary to this Court's decision in *Griffith*. That claim is without merit.

The decision in *Griffith* involved the propriety of selective rather than pure prospectivity. See *Beam*, 501 U.S. at 538 (opinion of Souter, J.), *id.* at 545 (White, J., concurring in the judgment); *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2530 (1993) (O'Connor, J., dissenting). The principle on which *Griffith* rests—that similarly situated criminal defendants should not receive different treatment simply because of the happenstance that one case rather than another is used as the vehicle for the announcement of a new rule—has no application

---

> 1st Has the applicant a right to the commission he demands?
>
> 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
>
> 3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

5 U.S. (1 Cranch) at 154. The Court resolved the first two questions in Marbury's favor but ultimately determined that it was without power to afford him relief.

to the present case.[27] Cf. *American Trucking Ass'ns*, 496 U.S. at 220-221 (Stevens, J., dissenting). The Court of Military Appeals did not afford Carpenter relief more extensive than that provided to petitioner. To the contrary, the court in *Carpenter* (as in the present case) affirmed the decision of the Coast Guard Court of Military Review. 37 M.J. at 299. Of course, if petitioner is constitutionally entitled to a new appeal before the Coast Guard Court of Military Review as a remedy for the Appointments Clause violation, the decision of the Court of Military Appeals cannot stand. *Griffith* has no bearing, however, on whether such an entitlement exists.

---

[27] The Court in *Batson* held that "[i]f the trial court [on remand] decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed." 476 U.S. at 100. Thus, the need to prevent "the actual inequity that results when only one of many similarly situated defendants receives the benefit of the new rule," *Griffith* v. *Kentucky*, 479 U.S. at 327-328 (internal quotation marks omitted), required that *Batson* be applied retroactively to cases pending on direct review not only in the choice-of-law sense (*i.e.*, that prosecutors' race-based peremptory challenges be treated as illegal) but in the remedial sense (*i.e.*, that proof of a violation would mandate reversal of the conviction) as well.

CONCLUSION

The judgment of the Court of Military Appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

PAUL M. GEIER
Assistant General Counsel for Litigation
Department of Transportation

CHARLES J. BENNARDINI
Lieutenant Commander, USCG
Senior Appellate Government Counsel

JOHN F. KOEPPEN
Lieutenant Commander, USCG
Appellate Government Counsel
Commander (G-LMJ)
United States Coast Guard

MARCH 1995

Supreme Court, U.S.
FILED
APR 10 1995
OFFICE OF THE CLERK

No. 94-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

G Arthur Robbins
2101 Defense Highway
Crofton, MD 21114
(301) 261-0035

Alan B. Morrison
Public Citizen
Litigation Group
2000 P. St., N.W., Ste. 700
Washington, DC 20036
(202) 833-3000

Allen Lotz
Counsel of Record
Christopher S. Keane
Christine M. Nugnes
Commandant (G-L-5)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593-0001
(202) 267-0115

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

RESPONDENT HAS FAILED TO ARTICULATE A JUSTIFICATION FOR APPLICATION OF THE *DE FACTO* OFFICER DOCTRINE IN THIS CASE 1

I. The Case Law Relied Upon By Respondent Does Not Support the Application of the *De Facto* Officer Doctrine 2

II. Neither Military Necessity Nor the Interest In Stability Justifies the Result Below 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

American Trucking Assns., Inc. v. Smith, 496 U.S. 167 (1990) 10

Batson v. Kentucky, 476 U.S. 79 (1986) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 3

Chevron Oil Co. v. Huson, 404 U.S. 974 (1971) ... 10

Cipriano v. City of Houma, 395 U.S. 701 (1969) .. 10

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) 10

Freytag v. Comm'r of Internal Revenue, 501 U.S. 868 (1991) 5, 6, 7

Glidden Co. v. Zdanok, 370 U.S. 530 (1962) 5, 6, 7, 8

Griffith v. Kentucky, 479 U.S. 314 (1987) 3, 4, 5, 11

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 4, 5

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 3, 4

Mistretta v. United States, 488 U.S. 361 (1989) 7

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 3, 10

Rostker v. Goldberg, 453 U.S. 57 (1981) 8

Tome v. United States, 115 S. Ct. 696 (1995) 10

United States v. Carpenter, 37 M.J. 291 (C.M.A.), *petition for cert. filed*, 62 U.S.L.W. 3411 (U.S. Oct. 29, 1993) (No. 93-676) 7, 11

Weiss v. United States, 114 S. Ct. 752 (1994) 6, 8

Williamson v. United States, 114 S. Ct. 2431 (1994) 10

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-431

JAMES D. RYDER, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

RESPONDENT HAS FAILED TO ARTICULATE A JUSTIFICATION FOR APPLICATION OF THE *DE FACTO* OFFICER DOCTRINE IN THIS CASE.

Respondent concedes that two of the three judges who heard Petitioner's direct criminal appeal were appointed to their judicial positions in violation of the Appointments Clause of the Constitution. Nonetheless, it argues that the

decision below should be upheld because Petitioner cannot prove that his appeal would have been decided differently if it had been heard by a properly constituted court. Such an approach trivializes the Appointments Clause, since such a showing could almost never be made except in conjunction with other constitutional violations. Moreover, as we demonstrate in Point I below, it is unsupported by any of the cases relied on by the Government, and is inconsistent with the Appointments Clause cases decided by this Court, where it has always been presumed that a violation would have rendered the action of the unconstitutionally appointed officer invalid. In addition, as we argue in Point II, neither military necessity nor the Government's reliance interest justifies the decision of the Court of Military Appeals.

I. The Case Law Relied Upon By Respondent Does Not Support the Application of the De Facto Officer Doctrine.

In its brief, Respondent principally relies on rules and analysis of prospective adjudication developed in *civil* cases to avoid potentially extreme disruption of settled expectations based on reasonable reliance on the then-current understanding of the law. Respondent argues that this case should be treated like others in which this Court has declined to overturn "past" or "prior" acts, or in which the challenge to the validity of an appointment is made in a "collateral attack." Resp. Br. 14–17. However, there is nothing past or collateral about the challenge made here: in a criminal case brought by the United States, Petitioner raised an objection to the use of unconstitutionally-appointed appellate military judges to decide his direct appeal, during the course of that very appeal.

Respondent further argues that this Court's cases permit the application of the *de facto* officer doctrine as a matter of remedy, while apparently conceding that it could not be used

as a matter of choice of law. However, the cases relied on by the Government are largely civil, not criminal, cases, and are readily distinguishable. *Buckley v. Valeo*, 424 U.S. 1, (1976), for example, was a civil suit that sought and obtained prospective declaratory and injunctive relief only; it was never an action to reverse any particular action of the unconstitutionally–constituted Federal Election Commission. Even so, some concern was expressed that granting blanket *de facto* validity to the acts of the Commissioners was inappropriate. *Id.* at 255 (Burger, C.J., concurring in part and dissenting in part). Similarly, in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the party challenging the authority of the bankruptcy court judges got exactly what it sought––dismissal of the contract and tort claims brought against it in an unconstitutional bankruptcy court. *Id.* at 56–57, 88. There was no suggestion that had those claims already been decided adversely to the objecting party, those decisions would have been allowed to stand.

Respondent also ignores the clear implication in *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), that purely prospective adjudication has no place in criminal cases, whatever its validity in civil cases. In *Beam*, Justice Souter, announcing the judgment of the Court, speaking of retroactivity in criminal cases, said that "retroactive application could hardly have been denied the litigant in the law–changing decision itself. A criminal defendant usually seeks one thing only on appeal, the reversal of his conviction; future application would provide little in the way of solace. In this context, without retroactivity at least to the first successful litigant, the incentive to seek review would be diluted if not lost altogether." *Id.* at 537. Because the defect involved in this case relates only to his appeal and not his

conviction, Petitioner is the unusual criminal defendant who seeks something other than the reversal of his conviction. However, Justice Souter's point about pure prospectivity being inappropriate in criminal cases applies with equal force. *Griffith*, strictly speaking, dealt with the concept of selective prospectivity in criminal cases, and found it to be inappropriate. *Griffith*, 479 U.S. at 328; *Beam*, 501 U.S. at 538. However, the clear implication of *Griffith* and *Beam* is that the "new" law announced in a criminal case must be applied to the litigant whose case is before the Court. The Court in *Griffith* indicated that the new rule "is to be applied retroactively to *all* cases . . . pending on direct review or not yet final . . .." *Griffith*, 479 U.S. at 328 (emphasis added). "All cases" must include the case in which the rule is announced. Surely, if selective prospectivity is forbidden in *Griffith*, total or pure prospectivity, as urged by the Government here, is even more improper.

This Court's decision in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), also undermines the decision below. In *Harper*, the Court clearly disapproved the concept of selective prospectivity in civil cases, but permitted Virginia to determine the particular remedy that would be provided to correct the defective scheme of taxation at issue there. *Id.* at 2519–2520. That was appropriate in *Harper*, because there were alternative possible methods to correct the error involved there. Here, however, there are no alternative ways to provide a remedy to Petitioner. Either the requirements of the Appointments Clause are enforced, and he gets a remedy, or those constitutional requirements are not enforced, he gets no remedy, and the Appointments Clause is rendered a nullity.

Respondent suggests that the prohibition on advisory opinions does not apply here because the military courts are

not Article III courts, and hence not limited to deciding cases and controversies. However, our argument based on the inappropriateness of advisory opinions is not grounded solely on the limitations of Article III, but on the more general approach to adjudication that this Court has followed. Indeed, if Respondent is correct, Petitioner would have been better off if the Court of Military Appeals had not declared that the appointments of the two civilian judges were unconstitutional, or if the Government had filed a cross-petition with this Court on the Appointments Clause issue. In either case, if Petitioner had convinced this Court of the point that Respondent now concedes--the illegality of the appointments of the two civilian judges--the prohibition on advisory opinions would admittedly apply, and Petitioner would be entitled to another appeal. Moreover, if Article III is the basis for the differing treatment, state courts, which are not bound by the limitations of Article III, could continue the practice of prospective rulings, yet *Griffith* and *Harper* plainly forbid that.

The clear implication of this Court's cases involving challenges to the appointments of judges is that a constitutional defect in the appointment invalidates the judge's actions with respect to any party who has been affected by the judicial acts of the improperly appointed judge, particularly any party who had raised the issue on direct review of the case. In *Glidden v. Zdanok*, 370 U.S. 530 (1962), Justice Harlan phrased the issue as whether the judgments involved there were "vitiated" by the participation of judges alleged to have been improperly appointed as Article III judges. *Id.* at 533. This suggests that, if the judges were found to have been improperly appointed as Article III judges, the judgments involved would have been of no force or effect. Similarly, in *Freytag v. Comm'r of Internal*

Revenue, 501 U.S. 868 (1991), the alleged Appointments Clause defect in the appointment of the special trial judge of the Tax Court was described as going to "the validity of the Tax Court proceeding that is the basis for this litigation." *Id.* at 879. Thus, if the appointments at issue in *Freytag* had been found to be defective, the proceedings conducted by those judges would have been found to be invalid. This is especially noteworthy because, in contrast to Petitioner, the taxpayer who contested the appointment of the special trial judge of the Tax Court had explicitly consented to have his case heard by that judge. *Id.* at 878. In these cases, as well as *Weiss v. United States*, 114 S. Ct. 752 (1994), the in-depth analysis conducted by the Court to determine the validity of the service of the judges at issue, without applying the *de facto* officer doctrine, is a further indication that a remedy would have been ordered if the judges' service had been found invalid.

Respondent argues that the decision below should be affirmed because there has been no showing of specific prejudice to Petitioner from the participation of the unconstitutionally-appointed civilian judges in the review of his case. Resp. Br. 24. In *Glidden*, however, this factor was specifically considered and rejected as bearing on the resolution of the case. *Glidden*, 370 U.S. at 533. The Court noted that there was no allegation or indication of any actual impact on the cases because of the participation of the challenged judges.

Similarly, Respondent's attempt to equate the decision below to a "harmless error" analysis is incorrect. Resp. Br. 33. Harmless error analysis requires a close look at all the facts and circumstances of the particular case, in the context of the particular proceeding. In this case, the Court of Military Appeals did not even attempt to analyze the possible

impact of the unconstitutional appointments in this case. Pet. App. 2a. It did not do so in the *Carpenter* case, either, in which it first applied the *de facto* officer doctrine to affirm the decision of the Court of Military Review. *United States v. Carpenter*, 37 M.J. 291, 295 (C.M.A.), *petition for cert. filed*, 62 U.S.L.W. 3411 (U.S. Oct. 29, 1993)(No. 93-676). Furthermore, the problem of the defective appointments goes to the very validity of the judgment, as discussed *supra*, so no showing of particular harm is required.

Respondent is correct that the defect in the judicial appointments at issue here is not quite the same as the defect at issue in *Glidden*. Resp. Br. 25-26 n.17. However, the *Glidden* decision specifically mentions Appointments Clause defects as among those that could be raised on appeal even if not raised below, like the Article III tenure and compensation protections specifically at issue there. *Glidden*, 370 U.S. at 536. The plain implication is that, if the issue can be raised on appeal, there must be a remedy if the Petitioner prevails.

In addition, it is not correct to conclude that Appointments Clause requirements provide no protection to individual litigants. The Appointments Clause is part of the Constitution's structural separation of powers, designed for the protection of the entire republic, *Freytag*, 501 U.S. at 873, which this Court described in *Mistretta v. United States*, 488 U.S. 361, 380 (1989), as "essential to the preservation of liberty." It promotes wise appointments, in part by placing the appointment power at a high level of authority considered to be publicly accountable. Permitting lower level officials to appoint officers diffuses the appointment power too widely. This diffusion of the appointment power increases the likelihood that unwise appointments to office (or, for that matter, removals from office) will escape public notice and political accountability. Proper enforcement of the

requirements of the Appointments Clause should act to benefit everyone, including litigants, by assuring careful consideration of appointees and enhanced scrutiny of appointees and their acts. These rationales are similar to those that underlie the Article III tenure and compensation provisions at issue in *Glidden*; both serve to benefit litigants indirectly by enhancing the integrity, competence, and independence of the judiciary.

II. Neither Military Necessity Nor the Interest in Stability Justifies the Result Below.

Respondent argues that the military setting in which this case arose bears on the resolution of the issue involved, because of the differences between military and civilian life, and the deference traditionally shown to Congressional regulation of military members. Resp. Br. 28–29. This argument has no validity in the particular setting of this case. It is well settled that Congress is not "free to disregard the Constitution when it acts in the area of military affairs." *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981). More particularly, just over a year ago, this Court made it clear that the Appointments Clause applies to the appointments of military judges. *Weiss v. United States*, 114 S. Ct. 752, 757 (1994). There has been absolutely no showing that considerations of military necessity had anything to do with the creation by Congress of the unconstitutional appointment scheme involved here, or the Court of Military Appeals' decision to afford *de facto* validity to the decisions of the improperly constituted Coast Guard Court of Military Review. Thus, deference to Congress or to the Court of Military Appeals in the area of military affairs can play no part in deciding the effect of the unconstitutional appointments at issue here.

Respondent also argues that the interest in stability and order in the military should dictate affirmance of the decision below. Petitioner agrees that order and stability are, in general, desirable goals. However, those goals do not take precedence over specific constitutional mandates, permitting them to be ignored with impunity. Furthermore, the broad goal of promoting order and stability in the military, or in any segment of society for that matter, is best achieved by doing things *correctly*, rather than permitting constitutional errors to go uncorrected. Affording *de facto* validity to the acts of unconstitutionally-appointed judges erodes order, stability, and respect for the clear requirements of the Constitution, which are the foundations upon which the military system rests. Moreover, the interest in military order and discipline has no connection to whether a decision by two civilian judges to sustain a court-martial conviction and sentence should be upheld.

Reliance interests are simply not relevant in determining the relief to which Petitioner is entitled, either. The Government cannot be considered an innocent third party which relied to its detriment on the defective appointments. The Government created the flawed system to begin with, and was aware of the problem when Petitioner's case was decided. Petitioner cannot be said to have "sat on his rights," thereby lulling the Government into a state of reliance, since there is no way that he could have challenged the appointments of civilians to the Coast Guard Court except in the course of his criminal appeal. As for the public, it cannot be seriously contended that members of the Coast Guard, let alone the general public, made decisions or structured their affairs in understandable, but erroneous, reliance on the validity of these judicial appointments.

This is in marked contrast to the cases cited by Respondent to support its reliance argument. These civil

cases generally involved potentially large numbers of litigants; *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); or large numbers and amounts of financial interests; *Id.*; *Cipriano v. City of Houma*, 395 U.S. 701 (1969); or litigants who could legitimately claim to have been "led astray" in conducting their affairs by erroneous interpretations of the law by courts; *Chevron Oil Co. v. Huson*, 404 U.S. 974 (1971); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). It is likely that these sorts of equitable concerns are not even proper considerations in determining the relief to be granted in a criminal case. *See American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 178 (1990)(plurality opinion), and 209 (Stevens, J., dissenting)(Court has declined to give retroactive effect to decisions announcing new rules of law in some civil cases).

Respondent's expressed concern about the disruption that will be caused by "extensive collateral litigation" if Petitioner prevails in this case is speculative at best. Resp. Br. 30–31. The rights of other potential litigants, not before this Court, and not identically situated, cannot be determined in this case, and should not be addressed. Furthermore, this Court has not hesitated to decide issues and grant relief in criminal cases even when the decision has the potential to affect many cases. *See, e.g., Tome v. United States*, 115 S. Ct. 696 (1995)(prior consistent statements admissible, in spite of the normal rule against hearsay, only when made before motive to fabricate arose); *Williamson v. United States*, 114 S. Ct. 2431 (1994)(statements against penal interest exception to the hearsay rule applies only to statements or portions of statements that are actually against declarant's interest and which declarant perceives to be against his or her interest at the time the statement is made); *Batson v. Kentucky*, 476 U.S.

79 (1986)(race-based use of peremptory challenges to jurors violates Fourteenth Amendment). Any collateral litigation that may arise related to the issue involved here can be resolved in the usual manner, by courts deciding individual cases involving real parties represented by counsel, and after the normal adversarial process. Those few defendants like Petitioner will simply have their appeals reheard by a properly appointed Coast Guard Court of Military Review.

If the Government is correct here, it is not clear when, if ever, it would be required to give persons convicted of a crime in the Coast Guard a constitutionally appointed appeals panel. The rationale urged by Respondent and adopted by the Court of Military Appeals would surely apply to any Court of Military Review case decided before *Carpenter*, and probably to any case submitted or argued before then as well. But if the two civilian judges are *de facto* officers for those cases, why do they not continue in that capacity as long as their appointments last? According to the Government, unless a defendant could show actual prejudice from their participation, their rulings cannot be set aside; we can envision almost no case in which the kind of showing suggested by the Government could be made. Thus, not only would the ruling in *Carpenter* not be given the kind of effect required by *Griffith*, but it would have less impact than any of this Court's purely prospective decisions that are now proscribed. No decision of this Court permits that result, and nothing in any case in which any form of prospectivity was allowed would support it, either. Accordingly, the decision below must be reversed, and Petitioner given a new appeal before the Coast Guard Court of Military Review.

One final matter requires clarification. Petitioner in no way concedes the constitutionality of the appointments of the judges of the Coast Guard Court of Military Review by the

Secretary of Transportation, as Respondent suggests in its brief. Resp. Br. 21 n.14. As both Respondent and Petitioner agree, the validity of the Secretary's memorandum of January 15, 1993, is not presented in this case, and cannot be decided by this Court at this time. *Id.*; Pet. Br. 8 n.5. Petitioner seeks remand for a new appeal in the Court of Military Review because that is the stage of his case which suffered from the unconstitutional appointment scheme. Petitioner's request to remand this case to the Court of Military Review for a new hearing of his appeal can only be logically understood as a request for a hearing by the Coast Guard Court only with *constitutionally-appointed* judges. This should clarify any misunderstanding with respect to Petitioner's intent.

CONCLUSION

For the reasons stated, Petitioner prays that this Court reverse the judgment of the Court of Military Appeals, and remand the case for further proceedings.

Respectfully submitted,

G Arthur Robbins
2101 Defense Highway
Crofton, MD 21114
(301) 261-0035

Alan B. Morrison
Public Citizen
Litigation Group
2000 P. St., N.W., Ste. 700
Washington, DC 20036
(202) 833-3000

Allen Lotz
Counsel of Record
Christopher S. Keane
Christine M. Nugnes
Commandant (G-L-5)
U.S. Coast Guard
2100 2nd Street, S.W.
Washington, DC 20593-0001
(202) 267-0115

Attorneys for Petitioner

April 1995